

Original: 2043

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July 13, 2001

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

David J. DeVries, Esquire
Chief Deputy Attorney General
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Office of the Attorney General
Strawberry Square
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The Honorable Harold F. Mowery, Jr.
Senate Committee on Public Health and Welfare
Pennsylvania Senate
Senate Box 203031
Harrisburg, PA 17120

The Honorable Dennis M. O'Brien
House Committee on Health and Human Services
Pennsylvania House of Representatives
P.O. Box 202020
Harrisburg, PA 17120

Dear Sirs:

RE: Comments in regard to Medical Assistance Estate Recovery Final Form Regulations: Title 55 Chapter 258.

I am an elder law attorney and past Chair of the Pennsylvania Bar Association's Elder Law Committee. This letter is written to express my serious concerns regarding the Department of Public Welfare's final form regulations for the MA Estate Recovery Program, and with Section 258.3(g) of those regulations in particular.

Section 258.3(g) [which was numbered as Section 258.3(f) in the proposed regulations] attempts to allow the Department to assert a claim against assets that were

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transferred by a decedent prior to death and to which a transfer penalty as required by federal law [42 U.S.C. §1396p(c)(1)(B)(i)] has been applied (or which may have been specifically exempt from penalty). Indeed, the section provides that the Department will presume that any transfer of assets which a decedent made within one year of death for less than reasonably equivalent value is a fraudulent transfer under the Pennsylvania Fraudulent Transfers Act and is recoverable not only by creditors but also by the Personal Representative for the estate.

In my opinion, Section 258.3(g) directly conflicts with pre-emptive federal law governing transfers of assets by Medicaid recipients and estate recovery programs, and also exceeds the Department's authority under state law. In effect, it usurps the legislative function by making significant changes to Pennsylvania law regarding the administration of estates and fraudulent transfers. It will immeasurably complicate the estate administration process for small estates, may result in a significant increase in litigation, discourage the elderly from applying for needed home and community based services to the detriment of their health and the health of their caregivers, create needless complications and uncertainty in the law, and cloud title to real property and other assets.

In its comments to these final-form regulations, the Department has provided no explanation of its authority to revise Pennsylvania statutory law, nor any analysis of the negative economic and fiscal impacts of Section 258.3(g), nor any analysis of the revenues it anticipates this Section will generate due to Section 258.3(g). The Department has failed to respond to the concerns previously raised by the Independent Regulatory Review Commission in these regards. In its September 23, 1999 Comments on the Proposed regulations the Independent Regulatory Review Commission raised concerns with this Section 258.3(g) [a that time numbered Subsection (f)], in part, as follows:

"Subsection (f)

Several commentators have expressed the concern that the Department does not have the statutory authority to apply the Uniform Fraudulent Transfers Act (UFTA), as recovery of assets is preempted by federal law, 42 U.S.C.A. § 1396p. Assuming the Department does have the statutory authority, it's application is not consistent with the pertinent provisions of the UFTA. Senator Hughes and other commentators commented that Subsection (f) provides that all property transfers within one year of death "for less than reasonably equivalent value" are subject to recovery. However, Sections 5104 and 5105 of the UFTA establish several additional conditions that must be satisfied before a creditor can recover against an estate. There appears to be an inconsistency here.

We also question the Department's authority to apply Subsection (f) in any case. If the Department establishes its statutory authority, we request that the Department explain whether Subsection (f) conflicts with existing federal law, whether a personal representative, or anyone other than a creditor, can recover under the UFTA, and why the application of the UFTA is necessary and reasonable..."

In its Comment and Response Document to the final form regulations, the Department fails to address the concerns raised in the IRRRC Comments. The Department makes no response whatsoever to the IRRRC's request that it explain whether Section 258.3(g) conflicts with federal law, or whether a personal representative, or anyone other than a creditor, can recover under the UFTA. As the legal analysis set forth below will show, the Department could not adequately respond to these problems because Section 258.3(g) does in fact conflict with federal law and also fundamentally misinterprets and misapplies and attempts to rewrite the Fraudulent Transfer Act.

Due to the seriousness of these problems with Section 258.3(g) I request that the Senate Committee on Public Health and Welfare, the House Committee on Health and Human Services, the Independent Regulatory Review Commission, and the Attorney General, disapprove the final form regulations.

Analysis of Section 258.3 (g) **The Fraudulent Transfer Act Provisions**

1. General Description of Section 258.3(g).

Section 258.3(g) states: "Notwithstanding paragraph (b)–(e), a property which a personal representative or creditor could recover for the benefit of the estate under 12 Pa.C.S. Chapter 51 (relating to the Pennsylvania Fraudulent Transfers Act) is subject to the Department's claim. For purposes of this chapter, the Department will only presume that any transfer of assets which a decedent made within 1 year of death for less than reasonably equivalent value is recoverable for the estate."

This Section attempts to reach outright transfers made by the decedent to anyone (apparently including otherwise exempt transfers to a spouse or a minor or disabled child) as well as the decedent's creation of tenancies by entireties with a spouse, joint accounts, life estates, bargain gifts (such as the purchase of charitable annuity), and all other transfers where receipt of full consideration by the decedent cannot be proven. If enforced, this section will potentially make any transfer made by the decedent within a year of the date of death, without full consideration, subject to the Department's claim.

By its terms Section 258.3(g) will require the executor or administrator of the decedent's estate to use the provisions of the Pennsylvania Uniform Fraudulent Transfer Act (12 Pa.C.S. Chapter 51) to recover such transfers for the benefit of the estate and ultimately the Department. The Section will require executors and administrators of small estates to seek to recover transferred assets from the transferee (presumably through litigation or the threat of litigation). If the Personal Representative fails to pursue the Department's claims through use of the Fraudulent Transfer Act, the Personal Representative will be personally and strictly liable on the Department's claim (Section 258.8).

Thus, for example, if an individual who is over age 55 and has received covered Medicaid benefits at any time since August 15, 1994 transfers an interest in a home or a

car to his spouse, and then dies within a year, the Personal Representative must treat that transfer as a fraudulent transfer and recover the transferred interest for the estate. In the case of a transfer to a spouse, a "mortgage" [sic] would then be placed against real estate, or a security interest against an automobile. If the transfer was to a child, the Personal Representative would presumably sell the recovered asset and pay the Department's claim.

2. Section 258.3(g) Has Been Pre-empted by and Conflicts with Federal Laws Regarding Estate Recovery.

Federal law has intentionally preempted the area of Medicaid estate recovery. State estate recovery plans must: "comply with the provisions of section 1496p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid, and transfers of assets". 42 U.S.C. §1396a(a)(18).

Federal preemption of estate recovery occurred in 1993 when Congress enacted legislation which requires states to follow the federal mandates as to estate recovery. 42 U.S.C. §1396p(b) expressly limits the recovery tools available to the states and mandates that the states follow the federally established framework for estate recovery. Congress directed that "No adjustment or recovery of medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the state shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals. . . (B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate. . ." 42 U.S.C. §1396p(b)(1)(B).

Section 258.3(g) is in direct conflict with the mandatory federal requirements for Medicaid Estate Recovery programs. As stated above, a State may only seek recovery for Medicaid benefits correctly paid from the "estate" of the recipient. The federal statute dictates the definition of "estate" that each State must use in its recovery program. It allows the State to choose to use either a narrow or an expanded definition of the term "estate". The Federal statute provides:

"For purposes of this subsection the term "estate", with respect to a deceased individual -

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State. . . any other real and personal property and other **assets in which the individual had any legal title or interest at the time of death (to the extent of such interest)**, including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement" [emphasis added]. 42 U.S.C. §1396p(b)(1)(C)(ii)(B)(4).

The Pennsylvania Legislature chose to employ the more restrictive “probate” definition of estate (expressed in alternative (A) above) in our enabling legislation, unless the Governor were to approve expansion to property covered in the more expansive alternative (B) above. Pennsylvania law at 62 P.S. § 1412 provides: “... the department shall establish and implement an estate recovery program... the department shall recover from the probate estate of an individual With the approval of the Governor, the department may expand the estate recovery program by regulation ... to recover against other real and personal property in which an individual had any legal title or interest at the time of death.” (Emphasis added). Thus, as required by the federal law, Pennsylvania has limited recovery, even if expanded with the Governor’s approval, to assets in which “an individual had any legal title or interest at the time of death”.

The Department recognizes that under Pennsylvania law, the definition of probate estate is very limited. In these regulations the Department relies upon an expansion of “probate estate” to utilize a “national” concept of probate, rather than the narrow Pennsylvania definition. The Department thus proposes to include both assets passing under Will and assets passing under intestacy as being subject to estate recovery. Although I take no argument with the Department’s position that the Legislature intended to include intestate assets under 62 P.S. §1412, it remains undisputed that Pennsylvania chose the more limited “probate” definition of assets subject to recovery, unless the Governor approves expansion to the optional definition.

But even under the more expansive definition of estate permitted by Congress (and only with the Governor’s approval in Pennsylvania) the definition of the estate which may be subject to recovery is still limited to assets in which the individual had any legal title or interest at the time of death (to the extent of such interest).

Is the Department’s proposed claim under the Fraudulent Transfer Act limited to assets in which the individual had any legal title or interest at the time of death? The answer is clearly no.

At the time of death the decedent has no interest in assets which the decedent gave away outright during lifetime. **The decedent has no fraudulent transfer claim against assets he voluntarily and legally gave away in full compliance with federal and state law. Since assets gifted away are not assets in which the individual had any legal title or interest at the time of death, and the decedent did not have any legal claim under the Fraudulent Transfer Act at the time of his death, the department is precluded by both the federal and the state statutes from recovery.** This would be the true even if Pennsylvania had adopted the expanded definition of “estate”. **Expansion of recovery to assets in which the decedent held no interest at the time of death is not permitted under any definition of estate.** Assets given away by the decedent prior to death cannot be made subject to estate recovery. The transfer penalties mandated by federal law discussed below are the only restrictions that may be applied to such gifts. To the extent that Section 258.3(g) applies to outright transfers, it violates pre-emptive federal law. It also violates the Pennsylvania enabling statute.

Assets in which the decedent held an interest at the time of his death including joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement

could be subject to Pennsylvania Estate recovery under the federal statute and the Pennsylvania enabling Legislation, but (under 62 P.S. §1412) only with the Governor's approval. These are assets which may be reached through estate recovery because they are assets in which the decedent had a legal interest at the time of death. The Department can reach these assets for recovery purposes but only to the extent of decedent's interest. If the decedent himself had no fraudulent conveyance claim in regard to these assets at the time of his death, the Department may not use the Fraudulent Transfer Act for recovery purposes, because the Department may only recover from assets in which the decedent held an interest at the time of death to the extent of that interest. If the tenancy by entireties, joint account, life estate, etc were validly created, the state still cannot appropriately use the Fraudulent Transfer Act to reach these assets. It could, however, but only with the approval of the Governor, seek recovery directly from such assets to the extent of the legal title or interest held by decedent at the time of his death.

3. Section 258.3(g) Has Been Pre-empted by and Conflicts with Federal Laws Regarding the Effects of Transfers of Assets for Medicaid Purposes.

The federal Medicaid statute also preempts the area of penalties to be applied to transfers of assets in connection with Medicaid benefits. State Debtor-Creditor fraudulent transfer provisions are preempted by the specific transfer, lien and right of recovery provisions of the federal Medicaid statute.

Prior to the Medicare Catastrophic Coverage Act (MCCA) of 1988, federal law contained no mandatory provisions regarding the effect of transfers of assets for Medicaid purposes. Federal law merely provided certain restrictions on what the individual States could do in regard to recovery. Prior to that time, the Federal Government had not preempted the area. The mandatory transfer penalties of MCCA were applicable to resources transferred on or after July 1, 1988. (Section 303(b) of P.L. 100-360). The Act has since been amended so that today federal law provides for a period of ineligibility for transfers (for less than fair consideration) that occur within thirty-six months prior to the date of application (or sixty months in the case of trust related transfers). 42 U.S.C. §1396p(c)(1)(B)(i).

The federal rules regarding the effect of transfers of assets are mandatory on the States. 42 U.S.C. §1396p(c)(4) provides that "A state. . .may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection". In addition, since 1988 no transfer penalties are permitted for transfers to spouses and certain other persons (42 U.S.C. §1396p(c)(2)(B).

Congress could have enacted broader transfer penalties than those now contained in the federal act. But it clearly intended not to do so, and not to permit states to broaden the penalties. The federal law on transfers of assets intends to preempt the area (no doubt to provide uniformity among the states). The federal law specifically prohibits Pennsylvania from penalizing transfers of assets in a manner broader than that specified by the federal law.

Thus, under the terms of federal statutory law, Pennsylvania must adhere to, and may not deviate from the Federal requirements and limitations on transfers of assets and estate recovery. Section 258.3 (g) in effect adds a new penalty to transfers of assets which is outside the parameters permitted by the above cited federal laws. Transfers of assets will be penalized first during the decedent's lifetime, by application of the Federally mandated ineligibility period to the transfer. The transfer will then be penalized a second time after the death of the Medicaid recipient, under Section 258.3(g). Outright transfers of assets were penalized during the individual's lifetime. The obvious intent of Congress was to preempt the law concerning the effect of transfers of assets for Medicaid purposes. States are not permitted to broaden the penalties imposed on transfers of assets. The federally ordained penalty on transfers is the penalty and the only penalty that should be applied by the State. **States are not permitted to try to get a 2nd bite of this apple through estate recovery.** Section 258.3(g) attempts to do so through the artifice of the Fraudulent Transfer Act in violation of federal law.

4. Section 258.3(g) is Invalid under the Supremacy Clause of the United States Constitution.

State statutes or policies or regulations which conflict with federal statutes are invalid under the Supremacy Clause of the United States Constitution, Article 6, cl 2. Although the Medicaid program is enacted at each state's option, once implemented, it must comply with federal requirements. *King v. Smith*, 392 U.S. 309, 333 (1968). Courts have strictly construed the lien and estate recovery provisions of the Medicaid Act. *Pottgeiser v. Kizer*, 906F2d 1319 (9th Cir. 1990). These provisions are exceptions to the rule that recovery for medical assistance is generally prohibited. *Matter of Estate of Craig*, 82 N.Y. 2d 388, 624 N.E. 2d 1003, 604 N.Y.S.2d 908 (1993). The courts have consistently struck down state recovery attempts which exceed the parameters of the federal statute. In a recent case, the New York Court of Appeals denied the Medicaid Agency's attempt to apply fraudulent conveyance law to recover Medicaid benefits correctly paid. The appeals court stated that "Under both Federal and State law, plaintiff's [the State's] recovery of medical assistance correctly paid is precluded except under limited circumstances not applicable here (see, 42 U.S.C. §1396p[b][1]). . . Thus the plaintiff may not recover those benefits by seeking to set aside the trust as a fraudulent conveyance under the Debtor and Creditor Law . . ." *Bourgeois v. Stadler*, Court of Appeals of New York, decided April 6, 1999.

The transfer, lien, and recovery provisions of the Medicaid Act have been subject to significant federal scrutiny, analysis, and legislation. Congress is fully aware of transfers of assets and has spoken definitively as to how they are to be penalized. Congress, through its legislation, has preempted this area of law. Pennsylvania should not expand estate recovery through the use of Debtor-Creditor fraudulent conveyance laws never intended for those purposes. Section 258.3(g) is a misguided attempt to do an end run around the clear restrictions contained in the Federal and Pennsylvania statutes. It is in violation of both Federal and state laws and should be removed entirely from the proposed regulations. To clarify the issue for the future, and to prevent the Department from pursuing recovery in this manner, the regulations should specifically state that "the provisions of the Pennsylvania Uniform Fraudulent Transfer Act (12 Pa.C.S Chapter 51) shall not apply to the Department's claim. The Department's claim shall be limited to

assets in which the decedent had a legal title or interest at the time of death (to the extent of such interest)."

5. The Final Form Regulations effectively re-write the Pennsylvania Probate, Estates, and Fiduciaries Code thereby exceeding it's statutory authority.

The final form regulations, if approved, would effectively re-write many sections of the Probate, Estates, and Fiduciaries Code, for example, by creating new duties and liabilities for a personal representative, by changing the rights of claimants against distributed property under PEF Code Section 3532(b) [Regulation Section 258.9], by modifying the effect of a decree of discharge under PEF Code Section 3533 [Regulation Section 258.8(e)], by providing for unlimited periods for submitting claims [Regulation Section 258.4(f)] by providing for strict liability of the personal representative (Regulation Sections 258.8 and 258.12], and by creating an administrative tribunal for determining liability of a personal representative which is binding on the Orphans Court and in other judicial proceedings [Regulation Section 258.12(b)].

6. Section 258(g) lacks clarity and reasonableness: By it's terms it could extend to transfers by the decedent made more than one year of date of death.

Transfers made within a year of the date of death are presumed fraudulent under the Section, but transfers made prior to a year before death could be recoverable as well. The Section clearly states that "any property which a personal representative or creditor could recover for the benefit of the estate under 12 P.S. Chapter 51 (relating to the Pennsylvania Uniform Fraudulent Transfer Act) is subject to the Department's claim." If the Fraudulent Transfer Act is applicable, transfers made prior to a year before death are as recoverable as those made within a year. The Fraudulent Transfer Act Statute has a rather open ended limitations period: of "within four years after the transfer was made or the obligation was incurred, or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." 12 Pa.C.S.A. § 5109. This will apparently force the executor to seek to recover transfers made for at least four years, but the recovery period may well be unlimited. Since the obligation was not incurred until the death of the decedent (when the estate came into existence), and could not have been discovered by the claimant (the executor of the estate) until appointment, it would appear that the executor may bring an action within one year of the date of death for any transfer taking place after the commencement date of Estate Recovery (August 15, 1994). While the extension of the Department's claim to apply to any transfers made after August 15, 1994 will create great uncertainties and problems in the administration of estates, the proposed regulations do appear to be written to extend to cover all such transfers.

7. Section 258.3(g) creates unnecessary negative economic and fiscal impacts: incentives for litigation will result in costs to the Court system, transferees, and family members. Title to transferred assets will be clouded.

Given that the regulations contemplate that collection actions will be brought by private collection attorneys serving as Personal Representatives of the decedent's estate and who will be compensated at 6% of the value of the estate (see Section 258.11), the incentives are all in favor of such attorneys seeking recovery against assets transferred

many years prior to death. The potential for such actions will create a significant cloud on the title to real property and any other assets that were ever transferred by the decedent.

While at first reading it might appear that only transfers made within a year of the date of death are subject to the Department's claim. The regulations do state that the Department will only presume that transfers made within a year of the decedent death are fraudulent. But the regulations do not limit the Department's claim or the personal representative's responsibility (and liability) to transfers occurring within that time frame. Since Section 258.3(g) does not limit recovery to transfers made within a year of death, the implication is that the personal representative must recover against transfers occurring prior to that time. Given the personal liability placed upon the personal representative for failing to collect on claims of the Department (by Section 258.8) it can be anticipated that any prudent executor will reach back to attempt to recover against any transfers (including to spouse, joint tenants, outright gifts) made after August 15, 1994. And collection attorneys serving as executors on a percentage fee basis can be expected to give the broadest possible reach to the regulation. Much litigation can be anticipated between personal representatives and transferees as estates attempt to recover for any transfers made by the decedent. (Much litigation is likely even if the estate were not permitted make claims against transfers occurring more than one year prior to death). The administration of small estates will become much more extended in time, expensive, and complicated.

The burdens that will be imposed through the use of the Fraudulent Transfer Act in this manner far outweigh the need for this regulation. If fraudulent conveyance law is applied to Estate Recovery in the manner proposed in these regulations, the added complications, burdens, risks, and expenses that will be placed on the administration of small estates are hard to fathom. The open ended recovery period extending well before application for Medicaid benefits, the problems of proof as to whether or not there was adequate consideration, the lack of a dollar threshold for claims, the difficulties of determining what transfers were made, the applicability to marital transfers and to charitable transfers, the personal liability of the personal representative, all amount to an incredible intrusion of the government into the financial affairs of its citizens, especially personal representatives, transferees, the courts, and attorneys.

It should be noted that but for this regulation, the decedent's estate would have no claim in regard to any transfers voluntarily made by the decedent during lifetime. Section 258.3(g) will create a new and uncertain area of estate administration law: the recovery of non-probate assets by enforcement of a claim that did not exist during the life of the decedent by a person (the executor) without any interest in recovery. Not only does the estate have no interest in the recovery, it can be anticipated that personal representative will frequently be financially and emotionally opposed to enforcement of this artificial claim, as transfers will frequently involve family members. The personal representative will frequently be put into the position of pursuing litigation against other family members in order to attempt to recover money for the Department. Does the Department's interest in this expansion of estate recovery justify this level of intrusion, complication, expense, burden and harm to families and family relationships?

8. Section 258.3(g) Will Add Significant Confusion and Uncertainty to the Law Regarding the Effects of Transfers of Assets.

Section 258.3(g) makes transfers which were not fraudulent when made, and which are expressly permitted under federal and state Medicaid laws and regulations, presumptively fraudulent after the fact, (presumptively so if the transferor happens to die within a particular time). This will add a tremendous amount of uncertainty to the law, and to the situation of persons facing a long term illness. They and their families and their advisors cannot know if they are committing fraud at the time they act. Whether they have committed fraud or not will only be determined later, and is dependent upon at least one event totally outside their control (death of the transferor.) At the very least applying penalties through estate recovery to transfers that are authorized for purposes of determining Medicaid eligibility but may some day be deemed fraudulent, makes no logical sense, and will add even more confusion to a system that is already immensely complicated. What kind of system are we inflicting on the elderly of Pennsylvania? Shouldn't they, in the latter stages of life, be permitted to plan their affairs with some degree of certainty? As a matter of policy, don't we want to create systems that create certainty rather than uncertainty, especially for families facing the crushing burdens of long term care? As a matter of policy, transfer penalties should be consistent and uniform both before and after the death of the Medicaid beneficiary.

9. The Fraudulent Transfer Section (Section 258.3(g)) Will Create Significant Problems, Burdens and Liabilities in the Administration of Decedent's Estates and for Executors and Transferees Who May Have No Way of Protecting Themselves.

As long as Pennsylvania limited estate recovery to assets owned by the decedent at the time of death and which pass directly to his probate estate, notice and priority were not serious issues. Probate assets are under the control of the executor and the state could make its claim well within the period of normal administration. The executor would receive notice and have access to information needed to evaluate the legitimacy and priority of the state's claim. In addition, the executor would have control over the assets with which to pay the state's claim. Lastly, the executor normally will have legal help from an attorney who is hopefully familiar with the complicated requirements of estate recovery.

However, Section 258.3(g) extends the state's claim to assets over which the executor has no control and perhaps even no knowledge, including assets given away by the decedent, or sold for less than fair market value. In effect, Section 258.3(g) extends estate recovery to any asset in which the decedent held any interest over the last years of his life. How is the executor to know that the decedent transferred ownership of an asset at some time prior to his death?

For example, 10 months prior to his death, decedent makes a \$5000 gift (cash or perhaps a life insurance policy) to his Church. Under Section 258.3 this gift is presumptively a fraudulent transfer. Under Section 258.8 the executor is personally liable for failure to present this claim to Court. The executor's lack of knowledge of the existence of this gift does not appear to absolve the executor from liability. Even the filing of a formal court account and receiving a final court decree of distribution will not free the executor from liability. Section 258.8(e) provides that "...a decree of distribution will not discharge

the liability of the personal representative to the Department if the petition for distribution fails to disclose the existence of property subject to the Department's claim. . . ." There is no exclusion from liability for the executor acting in good faith. The liability standard is one of strict liability. How can an executor ever confidently close an estate and distribute the estate's assets, when there may be unknown Department claims for which the executor will be personally liable.

Similar problems may exist for transferees. How are the transferees to know that their assets are subject to the state claim? How are they even going to know the transferor died, let alone that the transferor was a recipient of Medicaid benefits? And yet, the transferee is liable to pay the Department's claim under Section 258.9.

10. Section 258.3(g) Will Place Significant Additional Burdens on Executors and Administrators of Small Estates.

With its provisions for liens on personal property, mortgages on real property, and trusts for investment assets with recourse to the courts required for withdrawal of principal, and personal liability on the executor for failure to protect the Department's claim, this section will create situations of immense complexity for executor's of small estates (and for surviving spouses and minor and disabled children, attorneys representing estates, and the court system).

11. Debtor/creditor Law Is Inapplicable and Inappropriate When Applied in the Context of Public Benefits

Fraudulent conveyance law is wholly inapplicable to the payment of Medicaid benefits because the transferor (the Medicaid beneficiary) is not and never will be a debtor, as that term is used in the Fraudulent Transfer Act. A "Debtor" for purposes of the Pennsylvania Uniform Fraudulent Transfer Act is "a person who is liable on a claim". (12 Pa.C.S.A. §5101). But a recipient of correctly paid Medicaid benefits is not liable on any claim. He does not have any obligation to repay the State for the benefits received. Even if this purported "debtor" were to inherit or otherwise acquire significant financial assets, he has no obligation to repay the State. Medicaid payments are made to recipients if they qualify at the time of payment. If the recipient later acquires available resources, he becomes ineligible for future benefits, but does not have to repay the benefits already received. The recipient of Medicaid benefits is not a debtor. Transfers can be fraudulent only if made by a debtor. If the transferor is not a debtor there can be no claim under the Pennsylvania Uniform Fraudulent Transfer Act. See Gilfix, *Fraudulent Conveyances: Alien to the World of Public Entitlements*, NAELA QUARTERLY, Vol VII, No. II (a copy of which is enclosed with this letter).

Even assuming debtor/creditor law could be applied to Medicaid benefits and the Department was a "creditor" and the transferor a "debtor" for purposes of the Fraudulent Transfer Act, the state cannot recover for benefits provided after disclosure of the transfers. It is a fundamental tenet of debtor/creditor law that there can be no fraud, if there has been disclosure to the creditor. If the transferor discloses the transfer to the County Assistance Office (under federal and state law for less than full consideration within 3 years of application for benefits must be reported), any benefits provided by the

“creditor” after the disclosure cannot be fraudulent as to that creditor. See 37 Am. Jur. 2d Fraudulent Conveyances § 144, and cases cited therein. This is just one more example of why fraudulent conveyance law should not and cannot be applied to the public benefits arena. It just doesn’t work. The Department was not a creditor, and the decedent was not a debtor, and any transfer was not fraudulent.

12. Section 258.3(g) will negatively impact the health of thousands of Pennsylvania elderly. It discourages the elderly from applying for needed home and community based waiver services

The proposed regulations do not mention older persons who are eligible for Medicaid financed health care as one of the members of the class of persons affected by these regulations. But they are the persons who will suffer the most severe negative effects. By expanding the Medicaid estate recovery to transfers made prior to death Section 258.3(g) will almost certainly deter many older persons from seeking needed health care treatments. For example, the elderly who are in need of such services will not know if the automobile or other property they previously gave to a spouse or child will be subject to a state claim under Section 258.3(g) if they die. (The answer, of course, is that it may be). Not wanting to financially burden their families, the natural tendency of the elder will be to fail to apply for the needed benefits.

From personal experience I can relate that there are already many elderly in North Central Pennsylvania who do not apply for home care benefits under the Medicaid Waiver Program, because they know that Medicaid estate recovery will deprive their family members when the elder dies. Section 258.3(g) will increase the uncertainties and act as a significant deterrent to applying for health benefits. There is no question in my mind that Section 258.3(g) will have a chilling effect on applications for home and community based services and that many elderly and their family caregivers will suffer because of this provision.

13. Section 258.3(g) will encourage inheritance tax fraud by encouraging families to fail to report taxable transfers.

Some transfers within one year of date of death are subject to Pennsylvania Inheritance Tax. It was perhaps with inheritance tax in mind that the drafters of Section 258.3(g) set the one year presumption of fraud. (Cross checking inheritance tax returns might permit the Department to see what transfers are reported for inheritance tax purposes. The Department can then contact the transferees and make its claim).

Speaking from my personal experience of 27 years of law practice, I can report that clients often question the need to report transfers within a year of the date of death. Some clients say they don't see how the state would ever find out about the transfer, and they see the 4.5% tax as avoidable (albeit through neglecting to report the transfer). Of course, along with other attorneys, I am adamant that all such transfers must be reported; but I sometimes lose estate clients after the initial consultation, and I imagine that my requirement that all transfers within a year of death be reported is one reason. It is easy for the newly educated client to go to another lawyer, and just not mention the transfer.

Some people will commit tax fraud to save 4.5%. I am happy to report that most will not. However, with estate recovery, with its potential to confiscate the entire asset transferred, the incentive to fail to report transfers on inheritance tax returns will be much, much greater.

I don't know if this is a legitimate policy objection to Section 258.3(g). Perhaps not. But, I think I should at least point out that one unintended effect of Section 258.3(g) will almost certainly be to increase the number of Pennsylvania transferees who fail to pay inheritance tax on transfers of assets made within one year of date of death. This, of course, will have a negative fiscal impact on the state which will lose the revenues generated by the inheritance tax on the transferred assets.

14. Section 258.3(g) Will Create Significant Problems and Burdens in Regard to Property Ownership, the Quality of Title to Assets, and for the Ease of Conveying Property. It Will Create a Title Defect as to Real and Personal Property Anytime Property Is Transferred in Any Manner for less than Full Market Value.

The fraudulent conveyance provisions will cloud the title of any real or personal property transferred by anyone who may someday be over age 55 and who may someday apply for Medicaid. This class includes virtually every adult, and is not necessarily limited to those who are 55 years old. Given the extended reach of Section 258.3(g) these title problems are not limited to property passing through a decedent's estate but will potentially affect any property passing in any manner for less than full consideration. If a transfer is later found to be fraudulent under Section 258.3(g), the remedies available to the Executor under the Fraudulent Transfers Act include: avoidance of the transfer, attachment of the asset transferred, and injunction against further disposition of the property. (12 Pa.C.S.A. §5107). Thus the Executor may recover the specific asset, attach it and enjoin its further transfer.

Under Section 258.3(g) the Department's claim and associated title defects will apply to any transfer of assets of any kind for less than full consideration by any person who could someday be age 55 and apply for Medicaid benefits. The title will be clouded even during the life of the transferor and even though the transferor has not applied for Medicaid benefits, and may never apply for Medicaid. No one can know at the time of transfer whether the events that will trigger the estate recovery claim will later occur making the transfer fraudulent after the fact. The estate recovery claim will arise if two events later occur (1) the transferor applies for Medicaid, and (2) the transferor dies. Whether these events will occur and the transfer will therefore become fraudulent will only be known after the death of the transferor, whenever that occurs. This means that every transfer made without full consideration is suspect. Every gift to a spouse, every joint account created with a child, every gift to a family member, friend, or charity, could later become voidable, attachable, and enjoinable because (1) the transferor could apply for Medicaid some day in the future and (2) the transferor could then die. If those two events happen, then under Section 258.3(g) applies to invalidate the prior transfer as a fraudulent conveyance. Thus, the regulations make every transfer that is for less than full consideration a potential fraudulent conveyance dependent upon unknown future events. Transferees will not know whether they have good title to the assets they receive until after the transferor dies without having applied for Medicaid. The uncertainties and complications that Section 258.3(g) will add to property ownership and conveyancing in

Pennsylvania are incredible. The Section clouds the title of every asset given away or otherwise transferred for less than full consideration by anyone who could someday apply for Medicaid benefits in Pennsylvania.

Imagine the problems this extraordinary regulation will cause in practice. Assume you are a farmer's son. Your parent gives you a couple of acres of land upon which you and your wife build your home (a common occurrence in my rural area of Pennsylvania). But what happens to the son's home if the parent someday needs Medicaid subsidized home care or nursing home care? What happens to the house that the son builds on the lot that was "fraudulently" transferred, when dad dies? And even if dad never applies for Medical Assistance benefits, how can son be secure in building his home on the potentially fraudulently transferred (i.e. gifted) lot?

Likewise, what happens to the gift the over 60 year old churchgoer makes to his church, or to a grandchild for education? Everyone makes gifts. Generosity is a virtue to be encouraged, not a vice. But under Section 258.3(g) every gift is suspect. If, after the death of the donor, there is a Department claim, the executor of the estate is required to go after all these "fraudulent" transfers. (And, if no family member is willing to step forward to serve as executor in these extreme circumstances, the Department proposes to contract out to private attorneys and others who will have no compunctions about doing whatever is necessary to recover these gifts.)

What is the Department doing in proposing such a overreaching regulation? It is time to step back and take a look at the bigger picture. Surely we don't want to create a policy that turns every gift into a potential fraudulent act. Surely whatever policy considerations support applying fraudulent conveyancing law to estate recovery claims cannot justify creating these kind of complications and infringements on the property rights of millions of Pennsylvania citizens.

It may be noted that the proposed regulations do attempt to limit Section 258.3(g)'s effects on transferees who pay full value, provided they can prove they did pay fair market value for the property received (Sec 258.9). But this just points out that Section 258.3(g) will even create problems for transferees for full value. Transferees for value will have to be prepared to prove that they paid full market value for any property purchased. Must every purchaser at private sale get a formal written appraisal as proof that fair market value was paid? How long does the purchaser have to keep that proof? One year? Four years? Indefinitely?

Thus, under Section 258.3(g) quality of title problems will exist not only for recipients of gifts from the decedent but for transferees for full value as well. To be safe from the Department's claim every buyer of real or personal property in Pennsylvania should obtain proof that they paid fair market value? They have to do so even if no claim is in existence at the time of purchase, because claims can arise after the fact. And if there is a Department claim, how do the transferees find out about it? And if they know about it, how do they determine if the DPW claim is correct? Will DPW provide to anyone who asks the itemized listing of services provided to the decedent? Even if it does provide such information to potential transferees, how can the transferee determine if the claim is correct? Imagine a transferee, any transferee, trying to establish whether a DPW claim

is correct, with no information to go on. And if the original transferee is still alive, and there is no DPW claim at the moment, how does the transferee protect himself?

These are just a few of the questions and practical problems that will result from the Department's application of fraudulent conveyance theory to otherwise legitimate gifts. The Department's claim needs to be limited to the probate estate that is under the control of the Executor. To extend the claim to assets transferred during lifetime is to open Pandora's box.

The meaning of the presumption created in Section 258.3(g) is not clear. Is this intended to affect the burden of proof in any court or administrative proceeding? I must assume so. But, if it affects the burden of proof of its claim under the Fraudulent Transfer Act then it may, at least in some situations, reverse the burden of proof established in cases decided under the Pennsylvania Fraudulent Transfer Act. Under case law the burden of proof will in some situations be on the creditor. Thus Section 258.3(g) may establish a presumption that is inconsistent with, and in some case reverse, the burden of proof that would otherwise exist under the Fraudulent Transfer Act. The drafters of the Act specifically declined to establish such presumptions: "...these matters are left to the courts to determine..." PAUFTA, §5102 Committee Comment 6. See also, The Pennsylvania Uniform Fraudulent Transfer Act, The Pennsylvania Bar Association Quarterly, April 1994, p 76. The Commentators specifically described the concept of shifting the burden of proof to the debtor if the debtor was in debt at the time of the transfer as "an archaism . . . [which] in any event should not be followed in applying this chapter." PAUFTA, §5102 Committee Comment 6. The issue of presumptions and burden of proof should be left to the Courts as is intended under the Pennsylvania statute. The Department should not be permitted to legislate on this issue of presumptions and burden of proof under the Fraudulent Transfer Act, which is far outside the realm of the Department's expertise. The establishment of presumptions should be left to the Legislature and the Courts.

Conclusion: Due to Section 258.3(g) the Regulations Should be Disapproved

Section 258.3(g) should be deleted from the regulations because it is in conflict with both federal and state law. But even if fraudulent conveyancing law could legally be applied for estate recovery purposes to correctly paid Medicaid benefits, we should not go down that troublesome path. The application of Creditor/Debtor Fraudulent Conveyance law to estate recovery is so fraught with uncertainties and problems, so expansive of prior practice, so far beyond the normal understanding of "probate", so out of alignment with traditional fraudulent conveyance laws and concepts, and so significant in its consequences, that it should be accomplished, if at all, only through legislation not regulation.

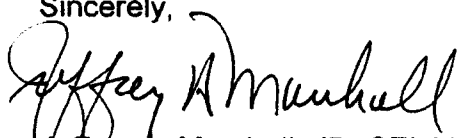
The federal and state laws and regulations governing the effect of transfers of assets on Medicaid benefits already create a uniform, established, workable, relatively certain system of controlling transfers of assets. Even if you were somehow to conclude that the federally mandated provisions regarding transfers of assets have not pre-empted the issue for estate recovery purposes, the federally established transfer penalties should be the only penalties applied. For reasons of certainty and practicality, estate recovery

should be limited to probate assets which are in the control of the personal representative. Assets that were transferred by the decedent during lifetime should not be subject to further penalty after death. The fraudulent conveyance laws should not apply to such transfers. Section 258.3(g) should be deleted in its entirety from the proposed regulations.

There is no need for Section 258.3(g). The Medicaid Estate Recovery program can be operated at less cost to the courts and the private sector and citizens of Pennsylvania (and probably at less cost to the Department), and with more clarity, less complication, less delay, less litigation, less ambiguity and uncertainty, and with more reasonableness if Section 258.3(g) is withdrawn. The problems created by Section 258.3(g) will be significant and long lasting with no only minor, if any, offsetting benefits.

I thus respectfully request that the Senate Committee on Public Health and Welfare, the House Committee on Health and Human Services, and the Independent Regulatory Review Commission and the Attorney General disapprove the final form Medical Assistance Estate Recovery Regulations based upon objections to Section 258.3(g).

Sincerely,



Jeffrey A. Marshall, JD, CELA*

* Certified Elder Law Attorney by the National Elder Law Foundation

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July 31, 2001

Independent Regulatory Review Commission
333 Market Street
14th Floor
Harrisburg, PA 17101

Dear Independent Regulatory Review Commission:

I am an Elder Law Attorney practicing in Franklin County, Pennsylvania, and am a member of the Pennsylvania Bar Association Elder Law Section. I have reviewed the proposed Medical Assistance Estate Recovery Regulations, and have the following comments:

1. The requirement that documentation of all gross assets be submitted to Ron Hill prior to obtaining a statement of Medicaid liens will significantly delay estate settlement. Documentation of "All Gross Assets" in large estates can take months. At a recent Pennsylvania Bar Institute seminar, Ron Hill suggested that the conditions set forth in Section 258.4, subsection (a)(8), were intended for gross estates of \$3,500.00 or less. You may wish to amend the Regulations to reflect this intent. Requiring large estates to provide documentation of the full gross value of assets, will require several months, prior to the estate requesting a statement of Medicaid liens.

2. Extending Estate Recovery to gifts made within one year of death is, effectively, a tax on low to middle asset families. Presuming gifts are "fraudulent transfers" is inappropriate.

July 31, 2001
Page 2

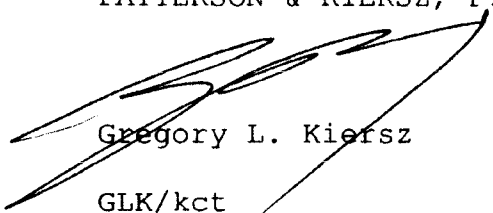
3. Designated personal representatives will decline to be sworn in, creating a basket of "unsettled estates." Where Estate Recovery would be claimed against children or collateral family members, I doubt that any family who are designated testamentary personal representatives would go after their immediate or extended family.

Although local attorneys could be deputized personal representatives of estates where families will not serve, there may be substantial reluctance by local attorneys to wear the mantle of the Sheriff of Nottingham, especially in small counties.

4. Eliminating the "homestead" exemption, on the presumption that a transfer within one year of death is fraudulent, will substantially impact only low asset and low income families, and will exempt middle and high asset income families, who have the where with all resources and to plan well in advance of the one year presumption of "fraud."

Sincerely,

PATTERSON & KIERSZ, P.C.



Gregory L. Kiersz

GLK/kct

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FAX TRANSMISSION COVER PAGE

DATE: 7-24-01
TO: Honorable John R. McSwain
COMPANY: Independent Regulatory Review
FAX NUMBER: 717-783-2664
FROM: Susan Klein
RE: Estate Recovery

NUMBER OF PAGES (including this cover sheet): 3

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July 24, 2001

VIA FACSIMILE ((717) 783-2664)

Honorable John R. McGinley
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Dear Chairman McGinley:

Following the proposed Medicaid Estate Recovery regulations published in July 1999, Philadelphia Corporation for Aging (PCA) provided recommendations in three areas:

- 1) The Department of Public Welfare (DPW) should establish exclusions for homesteads valued at less than \$50,000 to minimize estate recovery's impact on property abandonment and the refusal of services by MA long-term care eligible consumers.
- 2) The hardship waiver should be available for relatives other than immediate family members where they provided caregiving for two years or more. Especially, but not exclusively, in ethnic and minority communities, it is common for people to take care of extended family members.
- 3) Rules for hardship exclusions should be clear and specific. The current language is too vague and does not give assurance to MA recipients that they will be granted an exclusion if they meet the guidelines.

First, we would like to commend DPW for considering these recommendations and for proposing changes in each of our areas of concern.

- 1) Homestead exclusions: It is unfortunate that available data did not exist to convince DPW to be more responsive to our first recommendation. Nevertheless, recognizing the issues of home abandonment, DPW has suggested a method to encourage the maintenance of properties for elders who are receiving services at home or in a nursing home.

In order for people to utilize this hardship waiver (258.10 c) to recover funds used to maintain the property of Medicaid consumers, documentation of these expenses must be maintained. It is exactly the poorest people, living in the poorest housing and neighborhoods, who will have the most difficulty in record keeping. It was this group that PCA was most concerned about and for whom a flat homestead exclusion would be easiest to access.

Honorable John R. McGinley
July 19, 2001

Page 2

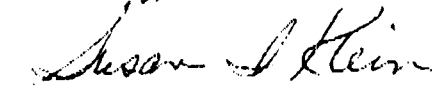
It is interesting to note that HCFA's new State Medicaid Manual effective on February 12, 2001, provides that homestead exceptions of 50% of the average home sales of a county could be considered as a homestead of modest value without further documentation. The provision, in fact, would not necessarily preclude a higher value. In Philadelphia, 50% of the average sale price would be \$25,000 and an exclusion of this amount would go far addressing the needs of low-income families and communities.

If DPW should continue with this hardship waiver based on documented expenses, the Department should work with consumer groups on developing the easiest method or forms for record keeping.

- 2) Hardship waiver for family caregivers: PCA applauds DPW for expanding the caregiver category to include other groups of people, such as foster children or grandchildren who frequently are the primary caregivers. It is very important for elders in any caregiving relationship to know that their primary residence may be transferred to their caregivers at their discretion without regard to traditional definitions of family and in recognition of the importance of the caregiving role in our society. It also benefits the Commonwealth since it encourages the use of waiver services over the more costly care in nursing homes.
- 3) PCA commends DPW for changes in the proposed regulation language that clearly states that waivers MUST be granted if the criteria are met.

In closing, we would like to reiterate our appreciation for the changes made in the Medicaid estate recovery regulations and our opportunity to work with DPW staff on these matters.

Sincerely,



Susan I. Klein
Director of Housing

Original: #2043



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July 20, 2001

John R. McGinley, Jr., Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

The Honorable Harold F. Mowery, Jr.
Senate Committee on Public Health and Welfare
Pennsylvania Senate
Senate Box 203031
Harrisburg, PA 17120

The Honorable Dennis M. O'Brien
House Committee on Health and Human Services
Pennsylvania House of Representatives
P.O. Box 202020
Harrisburg, PA 17120

Dear Sirs:

I am writing to comment on the Medical Assistance Estate Recovery final form regulations. The Elderly Law Project (ELP) is a unit of Community Legal Services, Inc. which provides legal assistance to low-income elderly persons. Many of ELP's clients are frail and in need of long-term care services. ELP receives calls nearly every day from elderly people or their caregivers who need assistance accessing Medicaid-funded nursing home or home and community based waiver services. Estate recovery is one of their primary concerns. The Department has made a number of very positive changes, which we support, to the hardship waiver provisions as they originally appeared in the proposed regulations. However, we are extremely concerned that Section 258.7 (postponement of recovery) violates the federal Medicaid statute and will be harmful to surviving spouses and minor and disabled children. This section should be significantly revised prior to approval of these regulations.

Hardship waiver provisions

We applaud the changes which the Department has made to §258.10, concerning undue hardship waivers. By broadening the category of individuals who may qualify for a hardship waiver beyond immediate family members (§258.10(b)), the Department recognizes that nieces, nephews, grandchildren, and even more distant family members or non-relatives may make

substantial sacrifices, giving up their own homes and jobs to provide care to an elderly disabled person. We are also very pleased by the provision, at §258.10(e), waiving from the amount of the Department's recovery an amount equal to the necessary and reasonable expenses for maintaining the decedent's home while she was in a nursing facility or receiving home and community based services. By enabling family members to use their own funds to maintain the home without being penalized for doing so, the provision will help the elderly person to remain in or visit her home as well as slow the deterioration of vacant houses.

We continue to believe that the Department should waive recovery of homesteads of modest value, as do a number of other states. Florida, Kentucky, New Mexico and Vermont all have homestead exemptions, while South Carolina and West Virginia exclude real estate under a certain value (\$10,000 and \$5,000, respectively). Oregon only pursues recovery of real property interests where it is cost-effective to do so.

Most of ELP's clients leave behind in their estates only a rowhouse of very modest value, almost always significantly less than \$50,000, in a low or moderate income neighborhood. In many cases, the homes are in poor repair and worth as little as \$5,000-20,000. The amount which the Commonwealth could recover from such properties, especially after the costs of administering the estate and selling the property, is minimal. On the other hand, these homes are important to low-income survivors as housing. We have seen numerous instances in which properties were abandoned because there was no benefit to the survivors to selling it or paying upkeep due to DPW's claim. Once abandoned, such a property quickly deteriorates and is subject to vandalism, reducing its value and deteriorating the quality of the neighborhood. Even where surviving relatives are living in the home, they avoid probating the estate and reside in the home without a clear title. Because the deed is not in the name of the occupant, he or she cannot get a grant or loan to repair the property. The property deteriorates and may become dangerous or end up being abandoned. All of these occurrences negatively impact the quality of life in already fragile or troubled neighborhoods, and may drive down the property values of nearby homes.

The scope of this problem is potentially enormous, given that half of the homes in Philadelphia are owned by people over the age of 55. In 1997, nearly 23% of residential sales in Philadelphia were for prices below \$25,000. Philadelphia City Planning Commission, December 1998. Newly-released Census data reveals that there are almost 214,000 individuals age 65 and older in Philadelphia; the number of individuals age 85 or older (who are most likely to need long-term care services) grew by 20% in the past decade to 27,339. More than one-third of elderly Philadelphia residents have incomes below the poverty level, and one out of five elderly Philadelphia residents need some assistance with self-care activities, making them at risk for needing long-term care services. "Health of Philadelphia Elderly: Highlights of Survey Findings", Philadelphia Health Management Corporation, 1991. There are thus thousands of low-income elderly people in Philadelphia who receive or are at risk of needing Medicaid-funded long-term care services, and whose homes have minimal value. The Commonwealth should allow family members to keep these homes, thereby providing housing for low-income survivors and preventing the spread of abandoned, vacant houses.

Postponement of collection

We are extremely concerned about the postponement of collection provisions, located at §258.7, which violate the federal Medicaid statute and the Supremacy Clause. The federal Medicaid statute provides that “[a]ny adjustment or recovery... may be made only after the death of the individual’s surviving spouse, if any, and only at a time - (A) when he has no surviving child who is under age 21, or ... is blind or disabled...”. 42 U.S.C. §1396p(b)(2). The final-form regulations, however, effectively commence recovery before the events specified in §1396p(b)(2) by requiring the personal representative to impose a mortgage “or other recorded encumbrance” in favor of the Department on real estate (or a “properly perfected security interest” on personal property). §258.7(c). By requiring the imposition of a mortgage, the Department strips from the decedent’s estate a property interest which it acquires for itself. Section 258.7(c)(3) of the final-form regulations, moreover, requires any cash or cash-equivalents in excess of \$50,000 to be placed in trust, with terms and trustees approved by the Department. The trust must name the Department as remainderman and limits the circumstances in which the spouse or child may receive and use funds. §258.7(c)(3). These steps significantly affect the survivor’s interest in and ability to use the estate assets, while vesting a property interest in the Department, in violation of the federal prohibition against *any adjustment or recovery* prior to the events specified by statute.

Congress’ purpose in enacting 42 U.S.C. §1396p(b)(2) was to protect surviving spouses and minor or disabled children by allowing them to retain estate assets for their own needs. The final-form regulations frustrate this purpose by limiting survivors’ use of estate assets. For example, it is foreseeable that a minor surviving child might need to sell real or personal property from the deceased parent’s estate to pay for college tuition. This is a legitimate and indeed laudable expense on behalf of the minor child, but the encumbrance required by Section 258.7(c) would prevent it from being made.

The Department’s apparent intent in enacting these provisions is to prevent the estate assets from being consumed before the Department is repaid. While the Department may view this as a desirable policy outcome, there is no requirement in 42 U.S.C. §1396p(b)(2) that estate assets be preserved for eventual recovery. While many instances of delayed recovery will involve estates composed of a home which the surviving family member will live in and which will eventually be available for recovery, there may be instances (as described above) in which all of the assets are needed to provide for the needs of the spouse or child. Under the federal statute, this is not an impermissible outcome. The Department may not seek to advance its own policy goal of maximizing recovery by imposing requirements which violate the federal Medicaid statute. In a similar context, a federal court struck down state regulations which, while prohibiting estate recovery from the “proportionate share” of the estate left to the surviving spouse or disabled child, allowed recovery from the portion of the estate devised to other family members. Dalzin v. Belshe, 993 F. Supp. 732 (N.D. Ca. 1997). The state argued that if the court applied 42 U.S.C. §1396p(b)(2) as it was written, non-disabled heirs would receive money that could otherwise be reinvested in the Medicaid program. Id. at 734. The court held that such policy arguments were for the state’s lobbyists to make in Washington, and that the state could not pursue its policy goals by violating the plain meaning of the federal statute. Id.

This overbroad implementation of estate recovery also conflicts with the Governor's Executive Order 1996-1, which provides that Pennsylvania regulations shall not exceed federal standards "unless justified by a compelling and articulable Pennsylvania interest or required by state law." There is no specifically Pennsylvanian interest in encumbering assets subject to delayed estate recovery, nor does state law require such a result. We therefore strongly urge that section 258.7 be significantly amended prior to approval of these regulations.

Finally, the final-form regulations also do not explain how survivors and personal representatives will be informed that estate recovery will be postponed if there is a surviving spouse or disabled or minor children. How will a personal representative know to inform the Department that there is, for example, an adult disabled child, so that recovery can be postponed? The Department needs to take measures to inform survivors and personal representatives after the resident's death about the circumstances in which recovery will be postponed.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink that reads "Pamela Walz". The signature is written in a cursive, flowing style.

Pamela Walz, Esq.
Director
Elderly Law Project

cc: Fiona E. Wilmarth, Independent Regulatory Review Commission

Original: 2043

IRRC

From: Kemp Scales [Kemp@ScalesElderLaw.com]
Sent: Thursday, July 19, 2001 11:17 AM
To: IRRC@irrc.state.pa.us
Cc: Stanley M. Vasiliadis; Robert Clofine; Marielle Hazen; Lawrence A. Frolik; Gregory L. Kiersz; Frank A. Petrich; Carol Sikov Gross; Jan L. Brown; Jeff Marshall, JD, CELA
Subject: New Proposed Estate Recovery Regulations

Just a week ago I received a copy of DPW's proposed regulations regarding the Medical Assistance Estate Recovery program. As an attorney who has focused his practice on elder law for the past two years, I am concerned about some of the proposed changes in these regulations, particularly the "presumption of fraud" for gifts made within a year of death, and I wanted to notify you of my concerns, for whatever you think they are worth, before it is too late.

I am particularly alarmed at the proposed change to Section 258.3(g). The DPW wants authority to "presume that any transfer of assets which a decedent made within one year of death for less than reasonably equivalent value is recoverable for the estate" under the Pennsylvania Uniform Fraudulent Transfer Act. While it is easy to understand why the DPW would like such a provision, I regard it as exceedingly dubious, both from a legal and an ethical/moral point of view.

As regards the legal aspect, how can the DPW be considered to have been a "creditor" of the decedent at the time the transfer was made? Presumably, the DPW is thinking of "post-eligibility" transfers, that is, transfers/gifts made by the MA recipient/decedent after having been found eligible for Medical Assistance. (After all, if the gift is made prior to the person/decedent ever having qualified for Medical Assistance, the DPW is not by any stretch of the imagination a "creditor".) For example, the decedent sells his house (which had been a non-countable asset) and makes a gift of half of the proceeds to his children. While the DPW would no doubt like to see ALL of the proceeds used to reimburse it for Medical Assistance payments already made, neither federal law nor Pennsylvania law requires this. So how can the DPW be considered a creditor who has been "defrauded" by the transfer?

How can there be such a thing as a "presumption of fraud"? I thought it was hornbook law that each element of fraud must be proved by "clear and convincing evidence." And isn't the proposed change pre-empted by federal law? The Federal Medicaid law specifically permits such post-eligibility gifting, but imposes a period of ineligibility following the transfer. In other words, there is already a built-in penalty in the federal law. So, in the example given, roughly half of the proceeds have to be retained by the person on Medical Assistance to be used to pay the nursing home during that period of ineligibility. Once that period has passed, and the nursing home has been paid during the interim, the person can once again qualify for Medical Assistance, with no requirement whatsoever that DPW first be reimbursed for previous Medical Assistance payments. That person has already paid the penalty. So where's the fraud? And if the federal law says it's OK, how can Pennsylvania regulations legally say it isn't?

As regards the ethical/moral point of view, the case for such "Medicaid planning" was eloquently stated by Justice Bracken, of the New York Appellate Division, in a case affirming the right of a guardian to engage in Medicaid planning on behalf of the incompetent individual:

"No agency of the government has any right to complain about the fact that middle-class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves when it is the government itself which has established the rule that poverty is a prerequisite to the

receipt of government assistance in the defraying of the costs of ruinously expensive, but absolutely essential, medical treatment."

Matter of Bipin Shah v. Debuono, 694 N.Y.S.2d 88, 257 A.D.2d 256 (N.Y. App. Div. 2d Dep't, July 6, 1999).

The Court of Appeals, New York's highest court, reiterated the above language written by Justice Bracken and further noted:

"We agree with the common sense verity uttered by the Appellate Division that the transfer here was properly authorized because 'there can be no quarreling with the Supreme Court's determination that any person in Mr. Shah's condition would prefer that the costs of his case be paid by the State, as opposed to his family.'"

I hope your agency will reject this proposed change in the Estate Recovery regulations.

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JOHN S. KOOKOGHEY, ESQUIRE (OF COUNSEL)
ROBIN CONRAD
ELEANOR PERRY

July 19, 2001

The Honorable Harold F. Mowery, Jr., Chair
Senate Committee on Public Health and Welfare
Pennsylvania Senate
Senate Box 203031
Harrisburg, PA 17120

The Honorable Dennis M. O'Brien, Chairman
House Committee on Health and Human Services
Pennsylvania House of Representatives
P.O. Box 202020
Harrisburg, PA 17120

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

David J. DeVries, Esquire
Chief Deputy Attorney General
Review and Advice Section
Office of the Attorney General
Strawberry Square
Harrisburg, PA 17120

Re: Proposed Medical Assistance Estate Recovery Regulations

Dear Sirs:

Just a week ago I received a copy of DPW's proposed regulations regarding the Medical Assistance Estate Recovery program. As an attorney who has focused his practice on elder law for the past two years, I am concerned about some of the proposed changes in these regulations, particularly the "presumption of fraud" for gifts made within a year of death, and I wanted to notify you of my concerns, for whatever they are worth.

I am particularly alarmed at the proposed change to Title 55, § 258.3(g). The DPW wants the authority to "*presume* that any transfer of assets which a decedent made within one year of death for

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less than reasonably equivalent value is recoverable for the estate" under the Pennsylvania Uniform Fraudulent Transfer Act. While it is easy to understand why the DPW would like such authority, I regard it as an exceedingly dubious proposition, both from a legal and an ethical/moral point of view.

As regards the legal aspect, how can the DPW be considered to have been a "creditor" of the decedent at the time the transfer was made? Presumably, the DPW is thinking of "post-eligibility" transfers, that is, transfers/gifts made by the MA recipient after having been found eligible for Medical Assistance. (After all, if the gift is made prior to the person/decedent ever having qualified for Medical Assistance, the DPW is not by any stretch of the imagination a "creditor".) Suppose, for example, the MA recipient sells his house (which had been a non-countable asset) and makes a gift of half of the proceeds to his children. While the DPW would no doubt like to see ALL of the proceeds used to reimburse it for the Medical Assistance payments already made, neither federal law nor Pennsylvania law requires this. So how can the DPW be considered a creditor who has been "defrauded" by the transfer?

Furthermore, how can there be such a thing as a "presumption of fraud"? I thought it was hornbook law that each element of fraud must be proved by "clear and convincing evidence." And isn't the proposed change pre-empted by federal law? The Federal Medicaid law specifically permits such post-eligibility gifting, but imposes a period of ineligibility following the transfer. In other words, there is already a built-in penalty in the federal law. So, in the example given, roughly half of the proceeds have to be retained by the person on Medical Assistance to be used to pay the nursing home during that period of ineligibility. Once that period has passed, however, and the nursing home has been paid during the interim, the person can once again qualify for Medical Assistance, with no requirement whatsoever that DPW first be reimbursed for previous Medical Assistance payments. That person has already paid the penalty. So where's the fraud? And if the federal law says it's OK, how can Pennsylvania regulations legally say it isn't?

As regards the ethical/moral aspect, the perception by some media commentators that the Medicaid laws are being abused by wealthy individuals who "artificially impoverish" themselves in order to have welfare pay their nursing home bills is not what I see in my practice. The clients I deal with who are facing a nursing home placement are not wealthy people but largely middle and lower middle income people who have worked hard all their lives and are risking the loss of most or all of their life savings. And not as a result of some bad lifestyle choices they made, but simply because they're getting old and facing the deteriorating health that's a normal result of getting old. Nursing home costs in Titusville, Pennsylvania are now \$65,000 a year! Only the very wealthy can afford such health care. For my clients, their only choice is Medicaid planning or economic ruin.

The case for such "Medicaid planning" was eloquently stated by Justice Bracken, of the New York State Appellate Division, in a case affirming the right of a guardian to engage in Medicaid planning on behalf of his incompetent ward:

Honorable Harold F. Mowery, Jr., et al.
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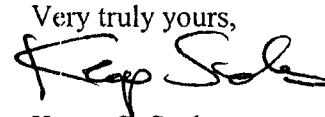
"No agency of the government has any right to complain about the fact that middle-class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves when it is the government itself which has established the rule that poverty is a prerequisite to the receipt of government assistance in the defraying of the costs of ruinously expensive, but absolutely essential, medical treatment."

Matter of Bipin Shah v. Debuono, 694 N.Y.S.2d 88, 257 A.D.2d 256 (N.Y. App. Div. 2nd Dep't, July 6, 1999).

The Court of Appeals, New York's highest court, reiterated the above language written by Justice Bracken and further noted:

"We agree with the common sense verity uttered by the Appellate Division that the transfer here was properly authorized because 'there can be no quarreling with the Supreme Court's determination that any person in Mr. Shah's condition would prefer that the costs of his case be paid by the State, as opposed to his family.'"

I hope your agency will reject this proposed change in the Estate Recovery regulations.

Very truly yours,

Kemp C. Scales

KCS\s\proposed estate recovery regs

cc: Dana Breslin, Chair,
PBA Elder Law Committee
Pappano & Breslin
3305 Edgmont Avenue
Brookhaven, PA 19015

Lawrence A. Frolik, Vice Chair
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University of Pittsburgh Law School
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Original: 2043

July 18, 2001

Richard Sandusky
Independent Regulatory Review Commission
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Harrisburg, PA 17101

David J. DeVries, Esquire
Chief Deputy Attorney General
Review and Advice Section
Office of the Attorney General
Strawberry Square
Harrisburg, PA 17120

Re: Comments regarding Medical Assistance Estate Recovery Final Form Regulations
55 Pa Code Chapter 258

Gentlemen:

I am an estate and elder law attorney practicing in York County. As such, I have a keen interest in how the Medicaid Estate Recovery regulations will impact my clients, the elderly population of Pennsylvania and the legal profession. Because of my interest in these issues, I submitted comments to the proposed regulations focusing on Section 258.3(g) of the regulation (this section was numbered 258.3(f) in the proposed regulations.) A copy of my letter dated August 20, 1999 commenting on the proposed regulations and setting forth the legal objections to Section 258.3(g) is enclosed.

I was pleased when the Independent Regulatory Review Commission (IRRC) issued its comments to the proposed regulations. In its comments, the IRRC recognized that Section 258.3(g) is problematic. In part, the IRRC stated as follows:

“Subsection (f)

Several commentators have expressed the concern that the Department does not have the statutory authority to apply the Uniform Fraudulent Transfers Act (UFTA), as recovery of assets is preempted by federal law, 42 U.S.C.A. § 1396p. Assuming the Department does have the statutory authority, its application is not consistent with the pertinent provisions of the UFTA. Senator Hughes and other commentators commented that Subsection (f) provides that all property transfers within one year of death “for less than reasonably equivalent value” are subject to recovery. However, Sections 5104 and 5105 of the UFTA establish several

July 18, 2001

Comments to DPW Final Form Regulations
Page 2

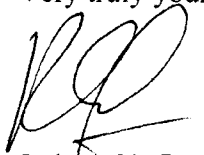
additional conditions that must be satisfied before a creditor can recover against an estate. There appears to be an inconsistency here.

We also question the Department's authority to apply Subsection (f) in any case. If the Department establishes its statutory authority, we request that the Department explain whether Subsection (f) conflicts with existing federal law, whether a personal representative, or anyone other than a creditor, can recover under the UFTA, and why the application of the UFTA is necessary and reasonable..."

This comment goes to the core of the regulatory review function as mandated by Section 5.1 of the Regulatory Review Act. The IRRC wanted to know the statutory authority for Section 258.3(g). The final form regulations give no answer. The IRRC wanted an explanation of the inconsistency between the regulation and the UFTA. The final form regulations give no answer. The IRRC wanted to know why the application of the UFTA was necessary and reasonable. The final form regulations give no answer. The Department of Public Welfare failed to provide answers because there are none. That is, the Department has no statutory authority for Section 258.3(g), there is an obvious conflict between Section 258.3(g) and the UFTA, and Section 258.3(g) is not necessary or reasonable to achieve the Department's stated goals.

As such, I write today to simply renew the concerns raised in my letter of August 20, 1999, and to focus attention on the Department of Public Welfare's failure to respond to the fundamental issues raised by the IRRC. Because of the objections to Section 258.3(g), I respectfully request that the Independent Regulatory Review Commission and the Attorney General disapprove the final form regulations.

Very truly yours,



Robert Clofine

enclosure

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ONE MARKET WAY WEST • YORK, PENNSYLVANIA 17401-1231 • TELEPHONE (717) 843-6333 • FACSIMILE (717) 846-0097 • EMAIL clofine@ptd.net

August 20, 1999

Mr. Charles Jones
Acting Chief, Third Party Liability Section
Department of Public Welfare
P.O. Box 8486
Harrisburg, PA 17105

Re: Comments Regarding Proposed Rulemaking
Medical Assistance Estate Recovery Program
55 Pa. Code Chapter 258
29 Pa. Bulletin 3888

Dear Mr. Jones:

I am an estate and elder law attorney practicing in York County. As such, I have a keen interest in how these proposed regulations will impact my clients and the elderly population of Pennsylvania as a whole. I have not had adequate time to analyze each section of the proposed regulations, but I felt compelled to write and express my concerns about what I see as the most problematic part of the proposal: Section 258.3(f).

I. SECTION 258.3(F) IS NOT VALID

I am familiar with the federal mandate set forth in 42 U.S.C.A. §1396p(b) that required the Commonwealth to implement an estate recovery program. In response to this federal mandate, Pennsylvania adopted an estate recovery program by virtue of legislation codified in section 1412 of the Public Welfare Code (62 Pa.C.S. §1412). That section permits recovery against all assets included in an individual's "probate estate". This complies with the requirements of federal law set forth in 42 U.S.C.A. §1396p(b)(4)(A). Likewise, the provisions of proposed regulation §258.3(a) through (e) inclusive comport with federal law and Pennsylvania's estate recovery statute. The provisions of §258.3(f) do not. The relevant part of objectionable subsection (f) reads as follows:

"a property which a personal representative could recover for the benefit of the estate under 12 Pa.C.S. Chapter 51 (relating to the Uniform Fraudulent Transfers Act) is subject to the Department's claim. For purposes of this chapter, the Department will presume that any transfer of assets which a decedent made within 1 year of death for less than reasonable equivalent value is recoverable for the estate".

A. Section 258.3(f) is Preempted by Federal Law.

A state statute or regulation is invalid under the Supremacy Clause of the Constitution if (1) Congress states so in express terms; (2) the scheme of federal regulation is sufficiently

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comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation; or (3) where state law conflicts with federal law. California Federal S. & L. Assn. v. Guerra, 479 U.S. 272 (1987). When measured against either of the three standards, it is clear that federal law preempts §258.3(f).

The federal Medicaid statute has long required the state to deny Medicaid eligibility to individuals who transfer assets for less than fair market value in anticipation of a medical assistance application. The purpose of these rules is to deter those who, though "gifting" or other disposal, knowingly seek to shelter assets from dissipation to nursing home costs. The legislative history indicates that it was Congress' purpose to establish a uniform national policy concerning prohibited transfers. House Report No. 100-105(II), 1988 U.S. Cong. and Adm. News p. 803, 897. Currently, transfers for less than fair market value that occur within 36 months of an application for Medicaid are penalized. Transfers prior to the 36 month look-back are not penalized. In addition, certain uncompensated transfers are permitted regardless of when they occur. For example, transfers of the home to a spouse, a minor or disabled child, a caretaker child or a sibling with equity are allowed. 42 U.S.C.A. §1396p(c)(2)(A). If §258.3(f) is adopted, these permitted transfers would be deemed fraudulent. Congress did not intend such an anomaly. Congress could have enacted broader transfer penalties than those currently in place and they could have used state fraudulent transfer rules as a part of that system. They did not. In fact, Congress has specifically prohibited the states from imposing stricter transfer penalties than those set forth in the federal law. 42 U.S.C. §1396p(c)(4). Accordingly, §258.3(f) stands as an obstacle to the accomplishment of Congress's objectives and is therefore preempted by federal law.

As further evidence of federal preemption, the Health Care Financing Administration (HCFA—the federal agency that administers the Medicaid program and establishes the guidelines that the states are to follow) did not tell the states to use fraudulent transfers laws to recover Medicaid. In fact, in §3810 C. 1. of HCFA's *State Medicaid Manual*, the agency recognizes that certain individuals divest assets to avoid estate recovery. HCFA made no suggestion that state should attempt to recover those divested assets. Rather, HCFA's guidance on estate recovery simply permits the states to consider such divestment in determining whether an undue hardship exists that would prohibit estate recovery. A copy of *State Medicaid Manual*, Health Care Financing Agency, Pub. 45-3, Transmittal 63 (Sept. 1994) containing Section 3810 is enclosed. Once again, §258.3(f) is more restrictive than the federal guidelines. (Please note that in answering question 24 of the Regulatory Analysis Form "RAF", the Department states that the proposed regulations are not more stringent than federal standards. This is doubtful.)

In other areas where Congress has created a comprehensive legislative framework, state fraudulent transfer laws have been preempted. For example, in Valley Ranch Development Co., Ltd v. Sunbelt Savings FSB, 714 F. Supp. 817 (N.D. Tex. 1989), affirmed 902 F.2d 348, cert. denied 498 U.S. 1025, the court held that the state fraudulent transfers laws were preempted by the federal law dealing with the regulation of the savings and loan industry. In that case, there was a conflict between the state and federal laws. Likewise, §258.3(f) conflicts with the federal scheme and is invalid for the same reasons.

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Quite clearly, Congress has intended to preempt state fraudulent transfer laws when it comes to Medicaid estate recovery. The extensive, detailed and repeatedly revised rules clearly indicate Congressional intent to regulate these activities. As a matter of constitutional law, the more specific transfer prohibitions contained in the federal Medicaid statutes preempt state debtor-creditor laws. If §258.3(f) is adopted, it would be invalid.

B. Assets Recoverable Under the Uniform Fraudulent Transfers Act Are Not Part of the Probate Estate.

As set forth in the preamble to the proposed regulations, only assets comprising part of the probate estate are subject to DPW's claim. Assets that could be recovered by the personal representative for the benefit of the estate would be part of the probate estate. Section 258.3(f) presumes that the personal representative can recover assets under the provisions of the Uniform Fraudulent Transfers Act (UFTA). However, on its face, the UFTA applies to "creditors" of the "debtor". The personal representative is neither. Therefore, the UFTA does not give the personal representative the ability to recover assets for the "probate estate".

The UFTA permits a "creditor" to recover fraudulently transferred assets. 12 Pa.C.S.A. §5107. Assuming arguendo that DPW is a creditor entitled to this protection, it is DPW who must assert the claim, and not the personal representative. Neither the personal representative nor the decedent's estate is a creditor under the UFTA. The UFTA defines "creditor" to be a person who has a claim. The personal representative has no claim to assert against the transferee of an inter vivos transfer. The personal representative does have the obligation to collect any asset due the decedent, but the personal representative's power to collect debts due the estate is no greater than decedent's power during his lifetime. Since the decedent was not an aggrieved creditor, neither is the personal representative. This distinction is highlighted in the case of Israel Estate, 14 Fiduciary Reporter 2d 233 (1994), wherein creditors brought an action against the decedent's estate claiming that the decedent made fraudulent transfers. Procedurally, this is how it works. It is the actual creditor who must bring the claim under the UFTA, not the personal representative.

This point is made clear if you consider that a transfer could be fraudulent as to one creditor, but not fraudulent as to another. If the personal representative were to claim the fraudulently transferred property on behalf of the probate estate, that property would be available to pay all estate creditors in accordance with the priorities set forth in Section 3392 of the Probate, Estates and Fiduciaries Code (20 Pa.C.S.A. §3392). As such, the recovered property could be distributed to creditors who were not defrauded by the transfer. This buttresses the argument that it is the one with the claim who has to bring the action under the UFTA. The one with the claim in this case is DPW; not the estate and not the personal representative. Since the personal representative cannot bring the claim, the recoverable property is not part of the "probate estate" and is therefore not subject to estate recovery under 62 Pa.C.S.A. §1412. Accordingly, if §258.3(f) is adopted it will effectively amend the UFTA by making the personal

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representative a "creditor" within the meaning of the Act. Such action is the province of the legislature.

This is not to say that there are not theories upon which a personal representative can recover transferred assets for the benefit of estate creditors. There may be. However, those theories are not part of the UFTA. Moreover, some states (e.g., Oregon) have probate statutes that require the personal representative to recover fraudulent transfers if the estate is insolvent. If that were the case in Pennsylvania, then perhaps §258.3(f) would be valid (assuming, of course, that DPW is a creditor entitled to the benefit of such creditor protection laws). However, Pennsylvania has no such statute and DPW has no authority to create such new law.

B. Other Objections Regarding Section 258.3(f)

1. It is not clear whether the UFTA applies in the context of public benefit programs. At least one court has decided that state fraudulent conveyance laws cannot be used to recover nursing home Medicaid. Bourgeois v. Stadler, 685 N.Y.S. 2d 166 (1998), leave to appeal denied by Court of Appeals of New York 4/6/99. Moreover, the proposed regulation ignores the difference between the individual and the individual's estate. Federal law **does not** provide for a right of recovery against an individual for Medicaid benefits properly paid. The individual has no debt and no fraudulent transfer claim would exist during the life of the Medicaid recipient. By waiting until the Medicaid recipient dies and claiming that he made fraudulent transfers, **DPW is asserting a claim against the individual**, not the individual's estate. This is a violation of federal law as DPW only has a claim against the estate, not the individual. The preamble to these proposed regulations states that they are needed "to resolve ambiguities" in the state and federal estate recovery statutes. Given that §258.3(f) is of questionable legality, it certainly does not achieve the goal of resolving ambiguity.

2. Section 258.3(f) creates a presumption that any transfer of assets which a decedent made within 1 year of death for less than reasonable equivalent value is recoverable for the estate under the UFTA. This presumption is of questionable legality and is not desirable from a policy standpoint.

First, there is no such presumption in the UFTA. To the contrary, the burden of proving that a transfer was fraudulent is generally on the creditor. As such, this new regulatory presumption would work to amend the statute. Once again, this is the province of the legislature. At a minimum, the adoption of such a presumption represents a policy decision of such a substantial nature that it requires legislative review.

Second, the regulation provides no exception for transfers that are specifically permitted under federal Medicaid law. For example, spouses are permitted to make penalty-free transfers to each other. In fact, under 55 Pa.Code §178.125(b), DPW **requires** an institutionalized spouse to transfer certain assets to the community spouse in order to become eligible for Medicaid. Under the presumption created by §258.3(f), these spousal transfers would

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be deemed fraudulent. Even if they occurred more than 1 year prior to death, they would be subject to recovery under 258.3(f). Likewise, holiday and birthday gifts to family members and contributions to charity within 1 year of death would also be deemed fraudulent.

3. Section 258.3(f), and the 1 year presumption in particular, will unnecessarily complicate the settlement of a Medicaid recipient's estate. Family members will be reluctant to become personal representatives if they are put under an obligation to recover "fraudulently" transferred assets. Most likely they will be asserting such claims against siblings or other family members. If the family fails to administer the estate, then under proposed §258.11, DPW could refer the estate to private counsel to administer. The combination of these two sections will create a new breed of "lawyer bounty hunter" who will set out to recover any and all assets that the decedent may have owned within the year prior to death and will force the transferee to establish that he or she paid reasonably equivalent value. This is not good policy and will undoubtedly lead to excessive litigation.

4. In answer to Question 14 of the RAF, DPW states that these regulations will not increase the number of persons adversely impacted by the estate recovery program. To the contrary, a very small number of estates are ever burdened with litigation associated with a fraudulent transfer claim. Under §258.3(f) and its 1 year presumption, nearly every estate will have to deal with the issue and the resulting litigation between the personal representative and the transferee. In this same vein, DPW answered Question 17 of the RAF as being "not applicable". That question asks about costs and/or savings to the regulated community. While I have no way of estimating such costs, my experience as an estate attorney tells me that was used to be a simple estate settlement now becomes a time consuming and expensive one for the parties and the courts. This is a result not only of §258.3(f), but the balance of the proposed regulations as well. These regulations will not benefit any of the participants in the estate administration process as the Department stated in response to Question 13 of the RAF.

II. Conclusion

Section 258.3(f) is not in the public interest. It does not achieve the Department's stated goal of providing clear guidance so that uncertainty and litigation is reduced. Quite clearly, §258.3(f) is all about litigation. It says the personal representative is to assert claims under the UFTA. How does this reduce litigation?

The preamble to these proposed regulations states that they will slightly increase revenues due to better compliance with estate recovery requirements. If better compliance is the goal, there is absolutely no need to resort to the UFTA as basis for recovery. The sole purpose of §258.3(f) is to raise revenue. It has nothing to do with compliance and will only engender noncompliance.

In sum, I urge you to rethink the Department's position on §258.3(f) as well as §§258.7, 258.8, 258.9 and 258.11. They represent an unwarranted expansion of the estate recovery program and not a true attempt to resolve statutory ambiguities.

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Thank you for the reviewing these comments. I would welcome the opportunity to have further input as you work towards the adoption of final regulations.

Very truly yours,

Robert Clofine

enclosures

cc: The Honorable Harold F. Mowery, Jr.
Senate Committee on Public Health and Welfare
Pennsylvania Senate
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House Committee on Health and Human Services
Pennsylvania House of Representatives
P.O. Box 202020
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Appendix 9-1

State Medicaid Manual Part 3—Eligibility

DEPARTMENT OF HEALTH AND HUMAN SERVICES
HEALTH CARE FINANCING ADMINISTRATION

TRANSMITTAL NO. 63—SEPTEMBER 1994

New Implementing Instructions—Effective Date: 10/1/93

Section 3810, Medicaid Estate Recoveries. These instructions provide guidance for meeting the requirements in §13612 of OBRA 1993. Section 13612 amends §1917(b) of the Act to require adjustments or recoveries of Medicaid benefits correctly paid on behalf of an individual. These instructions do not alter the regulations in 42 CFR 433.36 which permit States to recover benefits incorrectly paid.

If legislation other than for appropriating funds is needed in order to meet these requirements, the State may request a delayed compliance date through the HCFA regional office. Provide sufficient documentation, including an Attorney General's opinion, to demonstrate that State legislation is required. If legislation is needed, States will not be penalized for failing to comply with the terms of OBRA 1993 until the date specified in §13612(d)(1)(B). Since the Federal compliance remedy under the Medicaid statute is a prospective one, these States need not make their legislation incorporating the new statutory provisions retroactive to October 1, 1993. However, States that want to enact statutes retroactive to October 1, 1993, may do so.

3810. MEDICAID ESTATE RECOVERIES

Under the estate recoveries provisions in §1917(b) of the Act, you must recover certain Medicaid benefits correctly paid on behalf of an individual. The following instructions explain the rules under which you must recover from an individual's estate Medicaid benefits correctly paid and incorrectly paid.

A. Adjustment and Recovery. You must seek adjustment or recovery of medical assistance correctly paid on behalf of an individual under your State plan as follows.

1. *Permanently Institutionalized Individuals.* In the case of permanently institutionalized individuals who the State determines cannot reasonably be expected to be discharged and return home, including individuals who qualify as both permanently institutionalized individuals and who are at least 35 years old, you must seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien, at a minimum of amounts spent by Medicaid on the person's behalf for services provided in a nursing facility, ICF/MR, or other medical institution. These amounts also include Medicare cost sharing for qualified Medicare beneficiaries (QMBs) to the extent that the Medicare cost sharing was for these institutional services. At your option, you may also recover amounts up to the total amount spent on the individual's behalf for medical assistance for other services under the State plan. The date on which you determine the individual to be permanently institutionalized does not affect which expenditures you must or may recover from the individual or his or her estate. If you elect to recover all medical assistance, it would include assistance furnished prior to the time you determined the individual to be permanently institutionalized. If you only elect to recover for expenditures for institutional services, you must recover for all institutional services furnished to the individual, regardless of whether they were furnished during the current stay in the facility. Your State plan must reflect the medical assistance subject to recovery. Recoveries must be made from the individual's estate (after death) or from the proceeds of the sale of the property on which a lien has been placed.

Permanently institutionalized individuals are persons of any age who are inpatients in a nursing facility, ICF/MR, or other medical institution as defined in 42 CFR 435.1009, and who must, as a condition of receiving services in the institution under your State plan, apply their income to the cost of care, as provided in 42 CFR 435.725, 42 CFR 435.733, 42 CFR 435.832, and 42 CFR 436.832. You must specify in your State plan the process by which you will determine that an institutionalized individual cannot reasonably be expected to be discharged from the medical institution and return home, the notice to be given the individual, the process by which the individual will be given the opportunity for a hearing, the hearing procedures, and by whom and on what basis the determination that the individual cannot reasonably be expected to be

discharged from the institution will be made. States are not required to use the supplemental security income intent to return home rule for purposes of determining whether an individual is permanently institutionalized for purposes of estate recovery. This rule applies only to eligibility determinations.

2. *Individuals Age 55 or Older.* You must seek adjustment or recovery from the estate of an individual who was age 55 or older when that person received medical assistance. You must recover up to the total amount spent by Medicaid on the person's behalf, but only for spending on nursing facility services, (which includes skilled nursing facility and intermediate care facility for the mentally retarded services), home and community based services, as defined in §§1915(c) and (d), 1929, and 1930 of the Act, and related hospital and prescription drug services. Related hospital and prescription drug services are any hospital care or prescription services provided to an individual while receiving nursing facility services and home and community-based services. These amounts also include Medicare cost sharing for QMBs to the extent that the Medicare cost sharing was for nursing facility services, home and community-based services, and related hospital and prescription drug services described above. At your option, you may also recover additional amounts up to the total amount spent on the individual's behalf for medical assistance for any other items or services under your State plan. List these other items and services in your State plan. Recovery is limited to medical assistance for services received at age 55 or thereafter.

3. *Individuals with Long Term Care Insurance Policies.*

a. *Adjustment or Recovery Required.* Except as provided in §3810.A.3.b, you must seek adjustment or recovery from the individual's estate for all Medicaid costs for nursing facility and other long term care services if (1) assets or resources are disregarded to the extent of payments made under a long term care insurance policy, or (2) assets or resources are disregarded because the individual received (or is entitled to receive) benefits under a long term care insurance policy.

b. *Assets or Resources Disregarded/Not Disregarded.* If you had an approved State plan, as of May 14, 1993, (California, Connecticut, Indiana, Iowa, and New York) which provided for the disregard of assets or resources in determining eligibility for medical assistance either to the extent that payments are made under a long term care insurance policy, or because an individual has received or is entitled to receive benefits under such a policy, you are not required to seek adjustment or recovery from the individual's estate for Medicaid costs for nursing facility and other Medicaid long term care expenses. While HCFA cannot compel you to recover any amounts from the estates of these individuals, you are free to do so if consistent with the terms of your State plan.

4. Adjustment or Recovery Limitations. Adjustment or recovery can only be made after the death of the individual's surviving spouse, if any, and only at a time when the individual has no surviving child under age 21, or a blind or disabled child as defined in §1614 of the Act. For Guam, Puerto Rico, and the Virgin Islands, any surviving child's blindness or permanent or total disability would be determined under the definitions found in the State plan program for providing assistance to the blind or permanently and totally disabled. If a lien is placed on an individual's home, adjustment or recovery can only be made when (1) there is no sibling of the individual residing in the home, who has resided there for at least one year immediately before the date of the individual's admission to the institution, and has resided there on a continuous basis since that time, and (2) there is no son or daughter of the individual residing in the home, who has resided there for at least two years immediately before the date of the individual's admission to the institution, has resided there on a continuous basis since that time, and can establish to the agency's satisfaction that he/she has been providing care which permitted the individual to reside at home rather than in an institution.

B. Definition of Estate. Specify in your State plan the definition of estate that will apply.

1. Probate Definition. At a minimum, you must include all real and personal property and other assets included within the individual's estate as provided in your State probate law.

2. Optional Definition. In addition to property and assets under the probate definition, you may include any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest). This includes assets conveyed to a survivor, heir, or assign of the deceased through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

3. Special Rule for Individuals with Long Term Care Insurance. In the case of individuals described in §3810.A.3.a, you must use the definition of estate as described in subsection B.2.

C. Undue Hardship. Where estate recovery would work an undue hardship, adjustment or recovery is waived. Establish procedures and standards for waiving estate recoveries when they would cause undue hardship. You may limit the waiver to the period during which the undue hardship circumstances continue to exist. Describe your policy in your State plan. You have flexibility in implementing an undue hardship provision. However, your undue hardship waiver protection does not apply to individuals with long term care insurance policies who became Medicaid eligible by virtue of disregarding assets because of payments made by a long term care insurance policy or because of an entitlement to receive benefits under a long term care insurance policy. California, Connecticut, Indiana, Iowa, and New York must apply their undue hardship rules to all individuals, including those eligible for Medicaid by virtue

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of State plan provisions related to the purchase of a long term care insurance policy.

1. *Undue Hardship Defined.* Undue hardship might exist when the estate subject to recovery is the sole income-producing asset of the survivors and income is limited (e.g., a family farm or other family business which produces a limited amount of income when the farm or business is the sole asset of the survivors). The legislative history of §1917 of the Act states that the Secretary should provide for special consideration of cases in which the estate subject to recovery is (1) the sole income-producing asset of survivors (where such income is limited), such as a family farm or other family business, (2) a homestead of modest value, or (3) other compelling circumstances. HCFA suggests that you consider the examples listed above in developing your hardship waiver rules, but does not require you to incorporate these examples once you have considered whether they are appropriate for determining the existence of an undue hardship.

In considering your criteria, you may conclude that an undue hardship does not exist if the individual created the hardship by resorting to estate planning methods under which the individual divested assets in order to avoid estate recovery. You may adopt a rebuttable presumption that if the individual obtained estate planning advice from legal counsel and followed this advice, the resulting financial situation would not qualify for an undue hardship waiver.

D. *Collection Procedures.* You must adopt procedures under which individuals who will be affected by recovery of amounts of medical assistance will have the right to apply for an undue hardship waiver. These procedures must, at a minimum, provide for advance notice of any proposed recovery. They must also specify the method for applying for a waiver, the hearing and appeal rights, and the time frames involved. You should specify the procedures used for collection, which must be reasonable. In the situation where recovery is not waived because of undue hardship and heirs of the estate from which recovery is sought wish to satisfy your recovery claim without selling a non-liquid asset subject to recovery, you may establish a reasonable payment schedule subject to reasonable interest. You may also undertake partial recovery to avoid an undue hardship situation.

E. *Adjustment or Recovery Not Cost Effective.* You may waive adjustment or recovery in cases in which it is not cost effective for you to recover from an individual's estate. The individual does not need to assert undue hardship. You may determine that an undue hardship exists when it would not be cost effective to recover the assistance paid. You may adopt your own reasonable definition of cost effective. However, any methodology you use for determining cost-effectiveness must be included in your State plan. If you made individuals eligible for Medicaid because of a long term care insurance policy or disregard of income because of the purchase of long term care insurance, you are restricted from using this waiver authority unless you had as of May 14, 1993, an approved State plan which provided for long term care

insurance-related disregards from income. In that event, you can use the undue hardship exception as a basis for applying a cost effectiveness test to individuals who became eligible based upon long term care insurance-related disregards.

F. Placement of TEFRA Liens. You are not required to use TEFRA liens in §1917(a) of the Act. Section 13612 of OBRA 1993 did not mandate the use of TEFRA liens. The TEFRA liens allow you to place liens on certain types of property and recover specific types of payments as described in subsections F.1 and F.2. You may use liens as a mechanism/tool to recover medical assistance incorrectly paid as indicated in F.1, or correctly paid on behalf of certain permanently institutionalized individuals, as indicated in subsection F.1.

1. Incorrect Payments. You may place a lien against an individual's property, both personal and real, before his or her death because of Medicaid claims paid or to be paid on behalf of that individual if a court determines that benefits were incorrectly paid for that individual.

2. Correct Payments. You may place a TEFRA lien against the real property of an individual at any age *before his or her death* because of Medicaid claims paid or to be paid for that individual when (1) he/she is an inpatient of a medical institution and must, as a condition of receiving services in the institution under your State plan, apply his/her income to the cost of care (as provided in 42 CFR 435.725, 42 CFR 435.733, 42 CFR 435.832, and 42 CFR 436.832), and (2) the agency determines that the person cannot reasonably be expected to return home as specified in §3810.A.1. The State's authority to place a lien after the individual's death is not restricted by the TEFRA lien provisions.

G. Restriction on Placement of TEFRA Liens. You may not place a TEFRA lien, as indicated in subsection F.2, on an individual's home if any of the following individuals are lawfully residing in the home: (1) the spouse, (2) the individual's child who is under age 21 or blind or disabled, as defined in §1614 of the Act, in States (or blind or permanently and totally disabled in Guam, Puerto Rico, and the Virgin Islands), or (3) the individual's sibling (who has an equity interest in the home and who was residing in the individual's home for at least one year immediately before the date the individual was admitted to the medical institution).

H. Termination of Liens. You must dissolve any lien imposed as provided in subsection F.2 on an individual's real property when that individual is discharged from the medical institution and returns home.

I. Notice.

1. General Notice. You should provide notice to individuals at the time of application for Medicaid that explains the estate recovery program in your State.

2. Recovery or Adjustment Notice. You should give a specific notice to individuals affected by the proposed recovery whenever you seek adjustment or recovery. In the case that the individual is dead, the notice should be served on the executor or legally authorized representative of the individual's estate. The executor or legally authorized representative

Appendix 9-1

should be required to notify individuals who would be affected by the proposed recovery. In the situation where there is no executor or legally authorized representative, the State should notify the family or the heirs. The notice should include, at a minimum, the action the State intends to take, reason for the action, individual's right to a hearing, method by which he/she may obtain a hearing, procedures for applying for a hardship waiver, and the amount to be recovered. An administrative hearing is not required if State law provides for court review as the next appellate step.

J. Effective Date of New Provision. Section 13612 of OBRA 1993 does not apply to individuals who died before October 1, 1993. This section applies to Medicaid payments beginning on or after October 1, 1993.

K. Delayed Compliance Date. If legislation other than for appropriating funds is needed in order to meet these requirements, you may request a delayed compliance date through the HCFA regional office.

L. Effective Date—States with Estate Recovery Programs in Effect Prior to October 1, 1993. If you had an estate recovery program approved under your State plan and in operation prior to October 1, 1993, for individuals of any age who are determined permanently institutionalized prior to October 1, 1993, you may recover from the estate or upon sale of the property subject to a lien for all services correctly paid before October 1, 1993. You may also recover for services paid for before October 1, 1993, from the estate of an individual age 65 or older when that person received medical assistance. Recovery for these services is in accord with the features of your approved plan in effect prior to October 1, 1993.

Original: 2043

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BY THE NATIONAL ELDER LAW FOUNDATION

July 16, 2001

David J. DeVries, Esquire
Chief Deputy Attorney General
Review and Advice Section
Office of the Attorney General
Strawberry Square
Harrisburg Pa 17120

The Honorable Harold F. Mowery, Jr.
Senate Committee on Public Health and Welfare
Pennsylvania Senate
Senate Box 203031
Harrisburg, PA 17120

The Honorable Dennis M. O'Brien
House Committee on Health and Human Services
Pennsylvania House of Representatives
P.O. Box 202020
Harrisburg Pa 17120

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, Pa 17101

**Re: Medical Assistance Estate Recovery Final Form Regulations;
Title 55 Chapter 258**

Dear Sirs,

I am a private practitioner who has worked for over 26 years with the elderly. I am a certified Elder Law attorney by the National Academy of Elder Law Attorneys and chair the Pennsylvania Bar Associations Elder Law Committee. I received the Department of Public Welfare's Final Form Regulations for the MA Estate Recovery Program. These final form regulations addressed most of my concerns I referenced in my comments to the proposed regulations, however, they do not address my reservations about the fraudulent transfer section

formerly section 258.3 (f) and currently section 258.3 (g). In my opinion, this section conflicts with the pre-emptive federal law governing transfers by Medicaid recipients and estate recovery programs. It also exceeds the departments authority under state law in that it makes significant changes regarding the administration of estates and fraudulent transfers.

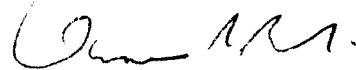
Section 258.3 (g) provides: Any property which a personal representative or creditor could recover for the benefit of the estate under 12 Pa. C.S. Chapter 51 (relating to the Pennsylvania Uniform Fraudulent Transfer Act) is subject to the Department's claim. For purposes of this chapter, the Department will only presume that any transfer of assets which a decedent made within one year of death for less than reasonably equivalent value is recoverable for the estate.

The Independent Review Regulatory Commission questioned the legal authority of the department to issue such a regulation. In its responses to the final form regulation, the department did not answer this question. The department indicated that the department as a creditor may pursue a claim under UFTA. The department further states that heirs should not be able to defeat estate recovery by gainsmanship. The regulation is intended to prohibit deathbed transfers to avoid liability for estate recovery. The department may, at its option, recover such fraudulent transfers or which the court so directs the personal representative to do so.

I understand that the department is trying to avoid deathbed transfers which are fraudulent. I do not oppose this. However, the proposed regulations do not speak to such. One year prior to death is not a deathbed transfer. Just as important, the regulation places personal liability on the personal representative. Therefore it is not the department raising the claim as the creditor but a personal representative caught and therefore needing to challenge any and all transfers within one year to protect himself or herself. If a transfer complies with federal and Pennsylvania law and regulations, has been reported to the department, and the application has been approved or benefits continued, the department should not be allowed to come back after death and challenge these transfers. For instance, federal and state law allows transfers of a house to a disabled child. If the unsophisticated parent and child are not aware of this rule and only learn of its existence within one year of death, should that parent be disallowed the right he has under the laws to make this transfer. On his death must the executor then seek guidance and departments approval that such a transfer was not fraudulent.

I have received a copy of Jeffery Marshall's comments which are a comprehensive analysis of federal and state laws and how the final Medicaid Estate Recovery Regulations conflict. I will not repeat those arguments since Mr. Marshall has done such a thorough job. However, I do concur with his analysis. I ask that Section 258.3 (g) be stricken from the final regulations and request that the Senate Committee on Public Health and Welfare, the House Committee on Health and Human Services, the Independent Regulatory Review Commission and the Attorney General disapprove the Final Form Medical Assistance Estate Recovery Regulations based upon these objections.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dana M. Breslin', written in a cursive style.

Dana M. Breslin

DMB:jah

MEDICAL ASSISTANCE ESTATE RECOVERY REGULATIONS**55 PA CODE CH. 258**

Original: 2043

#14-445**List of Major External Stakeholder Organizations****Lynnette Killian, Chair****Estate Recovery Workgroup, Long Term Care Council****215-456-8604**

37 Dunminning Road

Newtown Square, PA 19073

This workgroup represents statewide and local consumer, advocate, provider and county groups interested in the Department's estate recovery program.**Diane Menio, Executive Director****Center for Advocacy for the Rights and Interests of the Elderly (CARIE)****215-545-5728**

1315 Walnut Street, Suite 1000

Philadelphia, PA 19107

Pam Walz, Director**Elderly Law Project, Community Legal Services****215-227-2400 ext. 2431**

3638 North Broad Street

Philadelphia, PA 19140

Susan Klein**Philadelphia Corporation for Aging****215-765-9000**

642 North Broad Street

Philadelphia, PA 19130-3409

Mary Anne Kelly, Executive Director**Southwestern Partnership for Aging****724-779-3200**

201 Smith Drive

Cranberry Township, PA 16066

Ed Geiger, Director**Office of Community Development and Housing****Department of Community and Economic Development****717-720-7407**

502 Forum Building

Harrisburg, PA 17120

DPW, OPD - 7/3/01

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REVIEW COMMISSION

DEPARTMENT OF PUBLIC WELFARE
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FACSIMILE TRANSMITTAL SHEET

TO: Rich Sandusky FROM: Karen Kroh
COMPANY: DPW DATE: 7/3/01
FAX NUMBER: 783-2664 TOTAL NO. OF PAGES INCLUDING COVER: 1
PHONE NUMBER: 783-5417
RE: Reg # 14-445 - Estate Recovery

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

Attached is a list of major
external stakeholder organizations re:
MA Estate Recovery Reg.

Pls. call if questions or if you
need anything else for your review.
772-2681

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