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Department of Public Welfare
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Harrisburg, PA 17105

Re: DPW Reg. #14-445
MA Estate Recovery Program

Dear Counsel:

Thank you for , what I believe we all agree, was a very productive meeting yesterday. At your suggestion, I have reviewed *In re Cameron's Estate*, 388 Pa. 25, 130 A.2d 173, (1957) . I strongly disagree that it stands for the proposition that the department is entitled to a presumption that its claim is correct. Rather, it merely stands for the proposition that the traditional hearsay exception for official records applies. As such, the correct holding is that the department's records are admissible as official records.

> The official records produced by the Commonwealth indicated that checks were regularly issued during this period to Mary Cameron. It is a well established exception to the 'hearsay rule' that book entries, made in books of original entry, are admissible against a deceased debtor: *Engemann v. Colonial Trust Co.*, 378 Pa. 92, 101, 105, A.2d 347, 352, 48 A.L.R.2d 858. The records introduced by the Commonwealth were not the records of a private company but were official records prepared in the ordinary course of business by officials of the Commonwealth of Pennsylvania. Such records carry with them a presumption that they are valid and correct and that the official acts involved in their preparation have been properly performed: *Vernon Township v. United Natural Gas Co.*, 256 Pa. 435, 439, 100 A. 1007, 1008; *Fleming v. Adamson*, 321 Pa. 28, 37, 182 A. 518, 522; *Tremont Township School District Appeal*, 366 Pa. 404, 409, 77 A.2d 403, 406; *Beacon v. Robison*, 157 Pa.Super. 515, 521, 43 A.2d 640, 643; 31 C.J.S., Evidence, § 146.

388 Pa. 37, 130 A.2d 178

The *Cameron* case itself is a good example of the difference between a presumption that DPW's records are admissible and a presumption that it's claim is correct. In *Cameron*, the issue was whether the deceased had received and endorsed certain public assistance checks. To prevail, DPW had to show that the checks were issued and that the deceased received and endorsed them.

The "official records" exception only applied as to the first part of the claim, i.e. the checks were issued. The opinion shows that the department itself did not believe that this exception, or presumption did apply to the complete claim:

> The testimony of the Commonwealth's four lay witnesses **considered in conjunction with the official records constituted sufficient evidence** to justify the auditor in allowing the Commonwealth's claim during this period.

388 Pa. 38, 130 A. 2d 179 (emphasis added)

To repeat, the presumption applied to the authenticity and the accuracy of the records. The records only showed that certain checks were issued. Other evidence had to be produced for DPW to meet its burden to prove the claim, i.e. evidence that the checks were received and endorsed by the deceased.

The opinion repeats the rules on the proper allocation of the burden of proof and the standard of evidence that must be produced:

> **The burden of proving its claim rested upon the Commonwealth.** The late Mr. Justice Stearne, speaking for this court in *Re Moore Estate*, 349 Pa. 236, 240, 36 A.2d 812, 814, said: 'The measure of proof required to prove a claim against a decedent's estate in the orphans' court is stated in *Re Hirst's Estate*, 274 Pa. 286, 288, 117 A. 682: 'A claim against the estate of a decedent must be as definite and precise as is required to recover a debt in an action at law. While formal pleadings are dispensed with, the claimant should produce evidence showing the nature and character of the debt, its origin, the terms of the contract and the exact amount claimed to be due." To the same effect: *In re Deal's Estate*, 321 Pa. 484, 488, 184 A. 453, 454; *In re Braden Estate*, 363 Pa. 42, 46, 68 A.2d 734, 736. *Cf.*: *In re Donlevy's Estate*, 323 Pa. 173, 176, 185 A. 740, 742; *In re Winsmore's Estate*, 325 Pa. 303, 304, 190 A. 892. **A claim can be established against a decedent's estate only by evidence which is clear, direct and positive, or, as is sometimes expressed, clear, precise and indubitable**. Stafford v. Reed, 363 Pa. 405, 70 A.2d 345; *In re Mooney's Estate*, 328 Pa. 273, 194 A. 893.

388 Pa. 28, 130 A. 2d 174 (emphasis added)

Let me try to explain how I see this distinction between presumptions as to the accuracy of records as compared to presumptions as to the accuracy of the claim itself being applied in estate recovery cases. For example, when Mrs. Brown died your records showed that MA payments were made to the Shady Rest Nursing Home for the period January, 1996 through August, 1999 for care received by Mrs. Brown. The presumption in *Cameron* would permit DPW to admit those payment records to establish that payments were actually made. Suppose the personal representative responds that Mrs. Brown left the nursing home in February, 1999 and moved to a personal care boarding home. The burden of proof on the claim is on DPW to show that Mrs. Brown was still in the nursing home from February, 1999 through August, 1999. Your records would be entitled to a presumption that you paid the nursing home, not that she was still in the nursing home during that period. As DPW had to do in *Cameron,* you would need to produce other evidence besides your records to prove your claim.

If you would like to discuss this, please call. Thanks for your time in reviewing this material.[1]

Sincerely yours,

Niles Schore
Minority Chief Counsel/Executive Director
Public Health & Welfare Committee

cc: Mary Wyatte, Esq., Chief Counsel, IRRC
Scott Johnson, Majority Executive Director, Public Health & Welfare Committee

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[1] As an aside, I would like to add another quote from the opinion on another point raised in our comments:

> In *Higgins Lumber Co. v. Marucca*, 159 Pa.Super. 405, 407, 48 A.2d 48, 49, it was said: 'Depositing in the post office a properly addressed, prepaid letter raises a presumption that it reached its destination by due course of mail, and mailing a letter in such way is prima facie evidence that it was received by the person to whom it was addressed. *Whitmore v. Dwelling House Insurance Co.*, 148 Pa. 405, 23 A. 1131; *Jensen v. McCorkell*, 154 Pa. 323, 26 A. 366.' See also: *Beeman v. Supreme Lodge, Shield of Honor*, 215 Pa. 627, 64 A. 792, 793; *Fox v. Davey Compressor Company*, 318 Pa. 331, 334, 178 A. 469, 470.

388 Pa. 34, 130 A. 2d 177

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COMMENTS OF SENATOR VINCENT HUGHES ON DPW#14-445, MEDICAL ASSISTANCE (MA) ESTATE RECOVERY

1. §258.3(f) - Presumption that any transfer of assets made within one year of death is recoverable.

This section directs that "any property which a personal representative could recover for the benefit of the estate under the Uniform Fraudulent Transfer Act, 12 Pa. C. S. §5101 et seq is subject to the Department's claim". There are serious questions as to whether the Act is applicable to estate recovery situations at all, and I join in with those public comments that raised them. DPW has taken a step beyond the mandates of the Act itself, however, by creating a presumption that any transfer of assets made within one year of death is recoverable. The Uniform Fraudulent Transfer Act prescribes two sets of circumstances in which a transfer will be considered to be fraudulent and, therefore, subject to the remedies available under the Act. The first is:

> §5104. Transfers fraudulent as to present and future creditors.
>
> (a) General rule.--A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
> (1) with actual intent to hinder, delay or defraud any creditor of the debtor; or
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
> (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

The second provision is:

> § 5105. Transfers fraudulent as to present creditors.
>
> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Neither section permits a recovery of property simply because a transfer was made within one year of death. Both sections require a finding that the transferor/debtor was insolvent at the time of transfer, or was likely to become insolvent as a result of the transfer or was otherwise spending down a substantial part of the debtor's property. The one-year presumption that DPW would like to impose is inconsistent with the legislative scheme of the Uniform Fraudulent Transfer Act. DPW would put personal representatives in an impossible situation. They would be required by DPW to recover property under the Uniform Fraudulent Transfer Act but would have no remedy available under the Act. Further, certain transfers, e.g. to a spouse or child , are permissible under the same federal law that DPW is implementing with these proposed regulations, 42 U.S.C. §1396p, whether or not made within a year of death. DPW should delete this presumption.

2. §258.4(c) - Date stamps will conclusively establish the date of receipt of a notice from the personal representative and the date of submission of a statement of claim to the personal representative.

This section is unfair and inconsistent with general rules of service of legal papers. It is common experience that mail received in an office may be delayed in being stamped. Similarly, mail may be delayed in being sent out after it has been stamped. Fairness and general rules applicable to all other service of legal papers, would dictate that the documents and notations of the mail carrier be presumed to be accurate. This will reduce the risk of disparity between the actual date of mailing or receipt and the date on the date stamp.

The result of DPW's presumption is that any time deadline based on receipt of a notice to which it must respond commences on the date it actually receives the notice, or later if there is a delay in stamping. The personal representative and any heirs or creditors are faced with a submission date of the date of mailing, or even earlier if there is a delay between stamping and mailing. All parties should proceed under the same rules. Either all time requirements should be measured by date of mailing or by date of receipt. To have DPW propose that its time to respond should based on its date of receipt but everyone else's time to respond should be based on DPW's date of mailing is simply unfair and indefensible.

3. §258.5(f) - Rebuttable presumption that the statement of claim is correct. Burden of proof is on to the personal representative to show that the Department's statement of claim is incorrect by a preponderance of the evidence.

The Pennsylvania Supreme Court has established that a claim must be proven by direct evidence and that the burden of proof is on the claimant, not the estate:

> We begin by noting that "a claim against a decedent's estate can be established and proved only by evidence which is clear, direct, precise and convincing." ...It is also true, as appellants argue, that the burden of proof lies upon the claimant, *Estate of Allen,* 488 Pa. 415, 422, 412 A.2d 833, 836 (1980). (citations omitted)

Further:

> Having chosen to bring the claim against the decedent's estate in the Orphan's Court, it was the Appellee's burden to establish and prove that claim by evidence which is clear, direct, precise and convincing. *Estate of Cornell,* 511 Pa. 475, 478, 515 A. 2d 555, 556 (1986)

DPW has no authority to shift the burden of proof from itself to the estate or to attempt to lower the standard of evidence it must produce to prove its claim.

4. §258.10 - Undue hardship waivers.

A. The federal law which mandates the implementation of an estate recovery program and which caused the General Assembly to enact Act 1994-49 and Act 1995-20 reads:

> (3) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency **shall waive** the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.

42 U.S.C. §1396P(b) (emphasis added).

The proposed regulation provides no standards to determine when an undue hardship waiver **shall** be granted. Proposed §§258.10(b), (c), and (d) only describe circumstances under which DPW **may** waive a claim. The federal government, through the Health Care Financing Administration (HCFA) issued guidelines for states to follow when implementing an estate recovery program. The relevant guidelines are found in the State Medicaid Manual (MAM) at §3810, Medicaid Estate Recoveries:

> 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.

The General Assembly was responding to the mandates of the federal law when it passed Acts 49 and 20 and certainly expected DPW to comply with those mandates. DPW's failure to do so is clearly **not** "consistent with the statutory authority of the agency and with the intention of the General Assembly in the enactment of the statute upon which the regulation is based".

B. HCFA has provided additional guidelines in interpreting the phrase "undue hardship" in its MAM provisions on another subsection of the same federal law that contains the estate recovery requirements. The MAM section on implementing 42 U.S.C. §1396p(c), the transfer of assets rules, includes:

> 5. Undue Hardship Defined.--Undue hardship exists when application of the ... provisions would deprive the individual of medical care such that his/her health or his/her life would be endangered. Undue hardship also exists when application of the ... provisions would deprive the individual of food, clothing, shelter, or other necessities of life.

MAM, §3258.10.C.

DPW should include this definition of "undue hardship" as the first step toward establishing enforceable standards that will ensure that "[w]here estate recovery would work an undue hardship, adjustment or recovery is waived"

DPW should the establish actual standards that describe when it **shall** grant undue hardship waivers. As set-out above, HCFA has granted great " flexibility in implementing an undue hardship provision". It has, however, given certain examples that it believes should be considered when determining the existence of an undue hardship:

> (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.

MAM, §3810.C.1.

DPW does include the income-producing test but, again, only as an example of when it **may** grant a waiver. Standards must be established that describe when DPW **shall** grant a waiver. Anything less violates both state and federal statutory requirements.

C. The biggest problem with DPW's implementation of the undue hardship provision is its failure to establish a homestead exemption, i.e. a minimum value of a decedent's home below which DPW will not seek recovery. I join with the many commentators who found that the failure to establish a minimum estate value for recovery was not in the public interest and would be harmful to the public health, safety and welfare.

I specifically refer to §§5.1 (h)(1)(v) and (2) which direct commission to consider the following when deciding to approve or disapprove final-form regulations

> (v)The impact on the public interest of exempting, or setting lesser standards of compliance for, individuals or small businesses when it is lawful, desirable and feasible to do so.
> (2) The protection of the public health, safety and welfare...

The public comments describe two critical factors which compel me to include that a $50,000 minimum home value should be established. First, a number of Area Agencies on Aging and senior citizens' advocates report that many seniors do not enter the home and community based services program which permits them to stay at home, as an alternative to nursing home care, because of the estate recovery program. The home and community based services program is clearly one that the general assembly supports. The proposed regulations, by placing serious obstacles in the path of Pennsylvanians trying to stay at home and receive home and community based services, are not "consistent with the statutory authority of the agency and with the intention of the General Assembly in the enactment of the statute upon which the [proposed] regulation is based." Second, a number of commentators describe how the estate recovery program has forced the families of decedents to abandon the homestead since the cost of probate and the claim of DPW leave the home worthless to the survivors. This has increased neighborhood blight in many communities, particularly those with "homestead[s] of modest value".

The minimum homestead value of $50,000 is reasonable given the following findings of the 1990 U.S. Census Bureau about homes in Pennsylvania:

1. The median value was $69,100;
2. The mean value of all homes with no was mortgage was $69,713;
3. The mean value of all homes was $87,166; and
4. 32.7% of all homes had a value less than $50,000 and 23.1% had a value less than $40,000.

DPW has the authority to establish a $50,000 homestead exemption. HCFA suggested that all states establish exemptions for homes of modest value. The public interest will be strongly served by establishing the homestead exemption. There is no good reason to refuse to do so.

D. In §258.10(b)(1), DPW restricts the waiver described therein to families of decedents who received nursing facility services. I must believe that this is a typographical error and that DPW intended to include decedents who received home and community based services as well. If it was intentional, DPW should explain why and explain its authority to exclude families of decedents who received home and community based services.

5. §258.11 - Unadministered estates

DPW proposes that it may have either its own employees or outside counsel administer estates if no one else has done so. For the reasons outlined in the section on undue hardship waivers, DPW should either administer an estate or grant a waiver. Failure to do one or the other will simply leave the home abandoned and make it impossible to transfer title. The estate recovery program should not lead to increased neighborhood blight.

6. §258.13(c) - Appeals for review of a request for waiver, compromise or postponement of collection shall be reviewed under an abuse of discretion standard.

Federal law demands that collections be postponed in certain circumstances, 42 U.S.C. §1396p(d)(2). There is no discretion in granting these postponements. Similarly, federal law demands that standards be established that define when waivers will be granted for undue hardship. While the state has flexibility in setting those standards, once they are set, something which DPW has failed to do I note, the standards must be applied uniformly. There is no discretion in applying those standards. The regulations should require an "error of law" standard of review, not the abuse of discretion standard in this proposal.

7. §258.2 - Definition of "Immediate Family Member"

Family configurations are far more complex than this simple, and unduly limiting definition would suggest. As DPW well knows, family caregivers often include grandchildren, spouses of adult children, nieces and nephews. The definition should be expanded to include them. The policy reasons to grant extra considerations to family caregivers are the same for this expanded list as they are for the original list.