**Nazareth Housing Services**
**A program of Mt. Nazareth Center, Inc.**
**285 Bellevue Road**
**Pittsburgh, PA 15229-2195**
**(412) 931-3510**
**(412 931-7255 (fax)**

AUG 16 1999

#14-445

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Department of Public welfare
Charles Jones, Acting Chief
Third Party Liability Section
PO Box 8486
Harrisburg Pa 17105

August 13, 1999

Dear Mr. Jones,

Nazareth Housing Services provides both a low income home ownership program and a program that offers critical home repairs to low income senior homeowners. It has been our experience that low income seniors frequently have low income adult children who are unable to provide financial assistance to their parents, particularly when a life threatening illness or long term disability is a reality.

I recommend that the Estate Recovery Act not consider the first $50,000 value in a Medicaid recipient's primary residence. I have seen too many vacant and distressed homes in Allegheny County, abandoned because of probate problems. I live across the street from an abandoned home. The owner is in a nursing home, lawyers are trying to sell the house for Medicaid reimbursement, but the house has been vacant for so long that it is infested with rodents, the roof is gone, dozens of trees have overgrown the property in close proximity to the house, and it is, in effect, unmarketable in its current condition.

Please do what you can to relieve these low income seniors of the burden of deciding between health care for themselves, and the loss of the only equity they probably have to leave to their needy children and grandchildren.

Thank you for your concern about this matter. I wish you the very best in your most difficult position.

Sincerely, Sister Cynthia Meyer

Sister Cynthia Meyer, CSFN
Director, Nazareth Housing Services

**COMMONWEALTH OF PENNSYLVANIA**
**DEPARTMENT OF PUBLIC WELFARE**
**OFFICE OF LEGAL COUNSEL**

**DATE:** August 18, 1999

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**SUBJECT:** Public Comment - #14-445

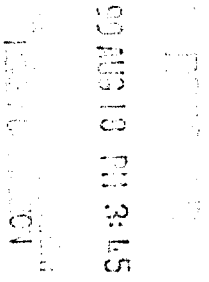
**TO:** Richard Sandusky
Director, Regulatory Analysis
Independent Regulatory Review Commission

**FROM:** Ruth O'Brien ROB.
Senior Assistant Counsel

Attached are public comments received August 17, 1999 on the MA Estate Recovery Regulations, #14-445.

Attachment

cc: Scott Johnson
Niles Schore
Sandy Bennett
Melanie Hauck



(13)

#14-44

philadelphia
corporation
for
aging

99 AUG 24 AM 11:28

August 16, 1999

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

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Dear Mr. Jones:

Philadelphia Corporation for Aging (PCA), the Area Agency on Aging serving Philadelphia, offers the following comments in response to the Department of Public Welfare's proposed rules on estate recovery (55 Pa. Code Ch. 258) released on July 24, 1999.

Based on our experience with estate recovery, we have identified ways in which this practice has produced unforeseen negative consequences. We are optimistic that much of the negative impact can be minimized and therefore appreciate the opportunity to provide input toward this aim. The discussion and recommendations below address our concerns relating to two broad areas: 1) the impact on service provision for low to moderate income seniors; and 2) the impact on neighborhoods. We look forward to seeing adjustments in approved rules that will lead to clearly stated policies and practices which are sensitive to demographic realities in our communities including ethnic and minority populations.

**What is the impact of estate recovery on service provision to older people?**

Estate recovery not only effects the older person's estate, heirs, and our fragile communities, but it has a direct impact on the quality of life for significant numbers of seniors who refuse needed Medicaid services because of the implications of estate recovery. Despite the fact that many of the homes owned by these seniors have little market value, there is a strong emotional attachment to one's home and a strong desire to pass on one's home and legacy to children, grandchildren or others who have been of assistance to them. Many of these homes have a market value that is so small as to make estate recovery by the state wholly impractical.

Medicare does not pay for community based long term care services and the 1915 C Medicaid Waiver is the only public resource to help MA elderly stay in their homes as their health status declines with age and disability. For many, their homes are the only remaining resource after exhausting years of savings to pay for care.

Some seniors will try to avoid estate recovery by refusing Medicaid Waiver services only to be forced into the more expensive alternative of nursing home care when they are faced with physical or mental

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deterioration. Placement would have been delayed or perhaps avoided if appropriate Medicaid Waiver supportive in-home services were accepted.

Rules for hardship exclusions should be as clear and precise as possible. The current language "the Department may find undue hardship and waive its claim" is too vague and does not give assurance to Medicaid recipients that they will be granted an exclusion if they meet the guidelines. This lack of specificity causes more people to reject services because they are not clear whether the estate recovery will apply to them.

Current rules permit the Department to find an undue hardship and waive its claim to the property, if an immediate family member resides in the home, is the caregiver to the senior for two years, and his or her income does not exceed 100% of the Federal poverty guidelines. In many families, there are important relationships that do not fall into the immediate family category such as grandchildren, foster children, nieces, nephews and others. Wouldn't the state want to reward caregivers who stay with them and help them to avoid premature institutionalization? Considering the aging of our population, this is as likely to be a grandchild as it is to be a child. This type of exception would need to be predicated on appropriate testamentary disposition.

**What is the impact of Estate Recovery on low-income neighborhoods?**

There are compelling reasons to believe that Estate Recovery is contributing to property abandonment and neighborhood decline in Philadelphia and other areas throughout the state that have low and moderate valued homes. First, heirs abandon properties if they will receive no benefit from selling. Considering the average MA nursing home cost in Pennsylvania is over $40,000 per year, the recoverable amount can quickly exceed the property's market value in fragile, low and moderate income neighborhoods. By the time there is a forced sale of the property, that property is likely to have been vandalized and uninhabitable. Abandonment results in countless cases.

Second, families who reside in the home may avoid probating the estate and reside in the home without a clear title. Because the title is not in the name of the occupant, the heir/resident cannot get a grant or loan to repair the property. Over time, the house deteriorates and that may lead either to dangerous living conditions or to the property abandonment, as the house gradually becomes unlivable.

This is NOT just a Philadelphia problem. While Philadelphia's average housing sale is under $50,000, there are many areas throughout the state that are equally vulnerable to the impact of estate recovery. The attached maps clearly show the rural countryside, small towns and older urban areas throughout the state that can also be affected by estate recovery.

**Recommendations**

In the notice to proposed rulemaking, DPW states "Although the Legislature has authorized the Governor to adopt a broad estate recovery program, the Department has generally elected to establish the minimum program required by Federal Law." DPW has generally accomplished this goal. Nevertheless less, federal law affords DPW the opportunity to further restrict estate recovery so as to avoid the harms identified above. It is noteworthy that no state recovers even 1% of the cost of their Medicaid expenditures. The benefits of estate recovery must be weighed against the costs to seniors, their families and our neighborhoods.

States have the option to establish exclusions regarding what size estate will be subject to recovery and 16 states have established a minimum threshold. One example is the State of Kentucky which excludes from recovery homesteads valued as much as $50,500.

To mitigate the harmful effects of estate recovery, Philadelphia Corporation for Aging recommends the following changes in the Department of Public Welfare's proposed rules for administration of Pennsylvania's estate recovery program.

1) The 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.

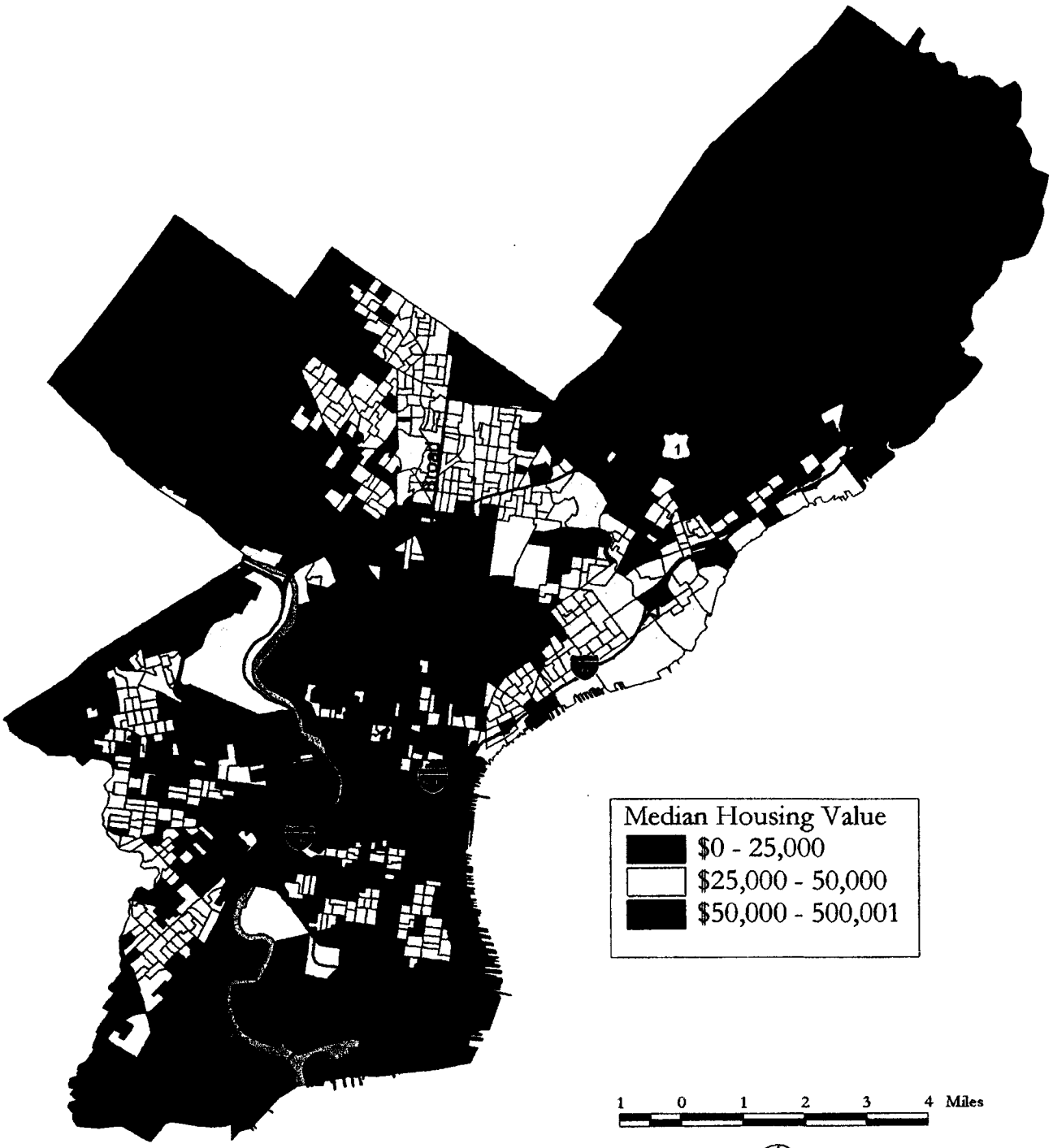
Thank you for your consideration of these comments.

Sincerely,

RODNEY D. WILLIAMS
President

RDW/km

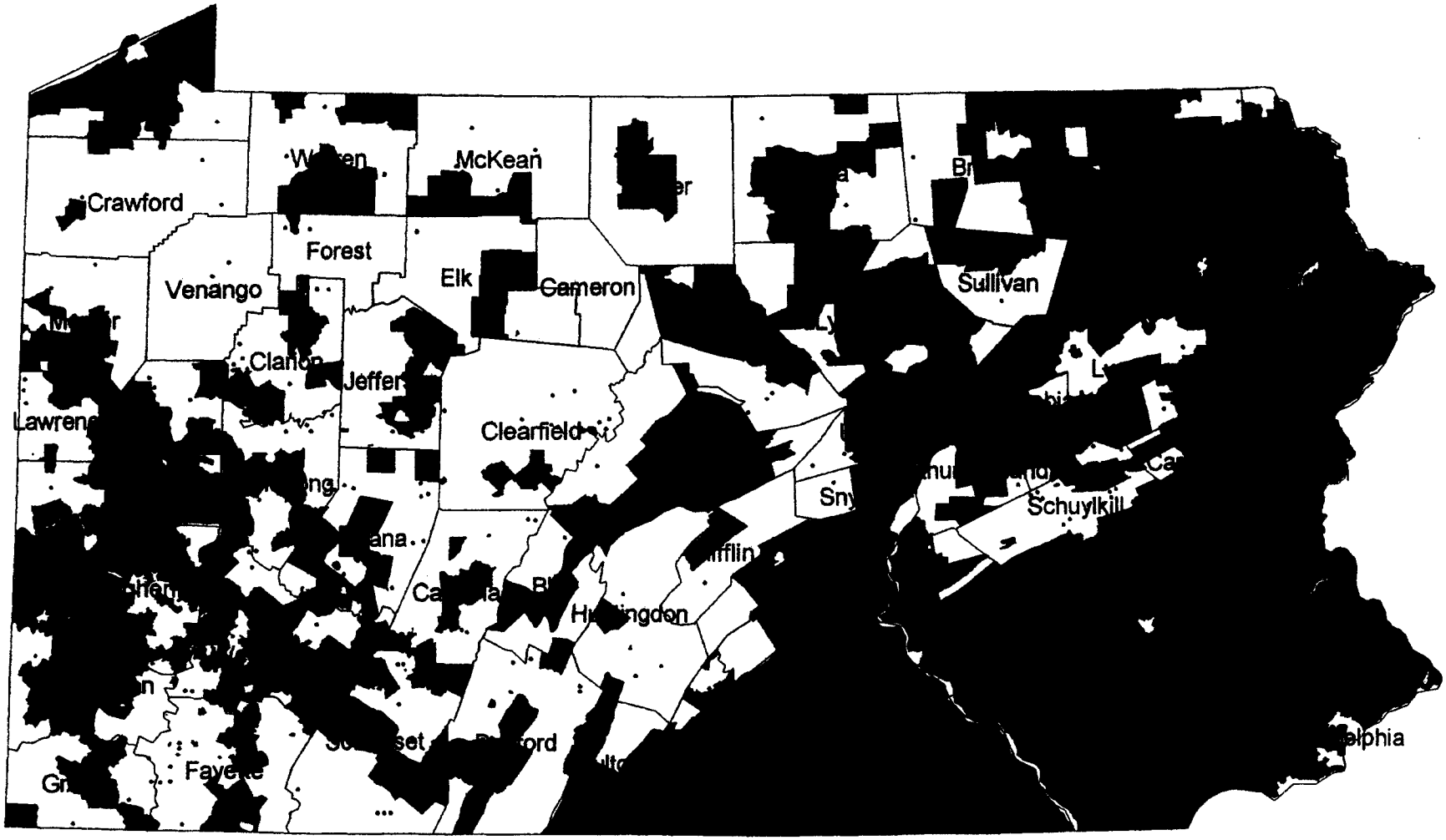
# Median Housing Values in Philadelphia




University of Pennsylvania
Cartographic Modeling Laboratory

Source: 1990 U.S. Census, block group level

# Median Housing Values in Pennsylvania




Median Housing Value
- $0 - 25,000
- $25,000 - 50,000
- $50,000 - 500,001
- Missing Data

Source: 1990 U.S. Census, zip code level

10 0 10 20 30 40 50 Miles

University of Pennsylvania
Cartographic Modeling Laboratory

COMMUNITY LEGAL SERVICES, INC.

LAW CENTER NORTH CENTRAL
3638 NORTH BROAD STREET
PHILADELPHIA, PA 19140
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By Facsimile

August 24, 1999

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

Dear Mr. Jones:

We are writing to comment on the proposed regulations relating to the Medical Assistance Estate Recovery Program published on July 24, 1999. The Elderly Law Project (ELP) is a unit within Community Legal Services, Inc., which provides legal representation and advice to seniors. Throughout its fifteen-year history, ELP has specialized in providing legal assistance to nursing home residents. Most of ELP's clients are low-income and rely on Medical Assistance in order to access long-term care. Each year, ELP receives dozens of requests for assistance from frail elderly people and their family members who are struggling to understand what the implications of receiving Medical Assistance for long-term care are for their homes and other assets.

We are pleased that the Department is issuing regulations to clarify its policies concerning estate recovery. The Governor's Executive Order 1996-1 states that in promulgating regulations, state agencies are not to exceed federal requirements unless justified by a compelling and articulable Pennsylvania interest or required by state law. In conformity with this principle, the Department should not expand the scope of its estate recovery program beyond the requirements of federal law. The proposed regulations, however, go beyond the federal estate recovery requirements in several ways which are harmful to low-income families and neighborhoods. By providing for recovery in all but a few narrow categories of cases, these regulations will further impoverish poor survivors of nursing home residents and cause an increase in vacant and abandoned housing in fragile neighborhoods. The Department can and should avoid these outcomes by establishing minimum estate values below which recovery will not be sought (or engaging in cost-benefit analysis), and granting hardship waivers more broadly than contemplated by the proposed regulations. It is also crucial that the regulations be clear and definite so that recipients and families know what to expect and that adequate and timely notice about estate recovery be provided to long-term care consumers.

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 no more than $10,000-20,000. 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.

A number of states have established minimum estate values below which recovery will not be sought or do not seek recovery in cases in which it is not cost-effective. Pennsylvania should establish similar guidelines. The decrease in revenue will be minimal, given that these are by definition estates in which there is little to recover after transaction costs. On the other hand, such a policy would benefit low-income survivors, by preserving their housing, and neighborhoods, by preventing vacancies and abandonment.

States are required to waive recovery in situations in which it would work undue hardship and have broad discretion to define the circumstances in which they will grant hardship waivers. States have responded by granting hardship waivers in such situations as where the estate property is the primary residence of the survivors, where the only asset is a homestead of modest value, where the survivor made personal contributions to the property of to the care of the beneficiary so the beneficiary could remain at home, and where recovery would deprive a survivor of the necessities of life.

The Department, however, has been using a very narrow definition of when a "hardship" exists for which recovery will be waived. The proposed regulations continue this approach, providing only limited circumstances in which hardship waivers may be granted. First, although the stated purpose of the proposed regulations is "to resolve ambiguities" concerning estate recovery, §258.10 gives no firm guidance to the long-term care recipients or their survivors as to whether they can expect to qualify for a waiver. Even in the limited circumstances identified in §258.10(b)-(d), the Department states only that it "may" find undue hardship. This is not much of an improvement over the current situation, in which elderly Pennsylvanians and their families receive little or no information about the criteria for hardship waivers. ELP frequently sees elderly people or their family members who are desperate for information about whether survivors will be able to remain in the home after the long-term care recipient's death. With no firm standards for when hardship waivers will normally be granted, consumers and their families

have no basis on which to decide whether to pay for upkeep and repairs for the home while the owner is institutionalized. If they decide that it is too risky to do so, the home will deteriorate and may become vacant for years while its owner is in a nursing home.

The legislative history of OBRA '93, the federal statute which mandated estate recovery, instructed that in establishing criteria for the states to apply in determining whether to waive recovery, HCFA should give special consideration in cases where the estate subject to recovery is a homestead of modest value. In its guidance to the states, HCFA suggests that states consider adopting this as a criterion. The Commonwealth should follow this suggestion and include in its criteria for hardship waivers circumstances in which the estate consists solely of a homestead of modest value. This would enable low-income survivors to remain in the family home and will prevent vacancies in properties where the costs are likely to outweigh the benefits of estate recovery.

The criteria at §258.10(b) should not be limited to an "immediate family member" of the decedent (defined as spouses, children, parents and siblings). Especially in communities of color where kinship ties of extended family are strong, it is very common for nieces, nephews, grandchildren, stepchildren, foster children and brothers- or sisters-in-law to care for elderly relatives in order to enable them to live at home for as long as possible. Because many of the individuals requiring care are in their 80s or 90s, their own children are likely to be in their 50s or 60s and have health problems themselves. As a result, grandchildren frequently step into the role of caretaker, at times quitting their own jobs or leaving their homes to care for their grandparent. The "immediate family member" limitation would penalize many caregivers who made great personal sacrifices to provide care which saved tax-payer funds by excluding them from consideration for hardship waivers. This exclusion is likely to disproportionately impact low-income, African-American, Latino and other minority communities.

A very important component of the estate recovery program which is absent from the proposed regulations is provision for timely and adequate notice about the program to recipients, their responsible parties and survivors. In our experience counseling and representing recipients and their families, we have found that they almost always have no or incomplete knowledge about estate recovery, even if they have received the Department's Admissions Notice Packet. The description of the program in the Admissions Notice Packet and the brochure which some applicants receive are too brief to be helpful. The lack of written information is exacerbated in Philadelphia by the fact that the only person an applicant ever sees, the Options assessment worker at the Philadelphia Corporation for Aging (PCA), is **not allowed** under PCA policy to answer any questions about estate recovery. More detailed written materials explaining what estate recovery is and how it works are desperately needed by consumers. In particular, adequate notice of the existence, criteria and application procedures for hardship waivers are essential if these are to be available in any meaningful way. In addition, time frames should be established within which waiver applications will be decided on.

Finally, we are puzzled and concerned by §258.7(c)(1), which requires where collection of real estate is postponed that the personal representative place a mortgage or other

encumbrance in favor of the Department upon the property. This requirement of placing what is effectively a lien on the property, appears to contradict the Department's policy of not utilizing liens. It also would make it difficult if not impossible in some cases for survivors to obtain loans in order to make necessary repairs on the home.

We appreciate the opportunity to provide input on this issue, which is of great importance to frail elderly Pennsylvanians and their families.

Sincerely,

Pamela Walz

Pamela Walz
Director
Elderly Law Project

cc: The Honorable Harold F. Mowery, Majority Chair / Senate Public Health & Welfare Committee
The Honorable Vincent Hughes, Democratic Chair / Senate Public Health & Welfare Committee
The Honorable Dennis M. O'Brien, Majority Chair / House Health & Human Services Committee
The Honorable Frank Oliver, Democratic Chair / House Health & Human Services Committee
Chairman John R. McGinley, Independent Regulatory Review Commission

(2)
#14-445

# MERCER COUNTY HOUSING AUTHORITY

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August 12, 1999

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

**SUBJECT: Comment on DPW's Proposed Rulemaking**
**55 PA Code Ch. 258**

Dear Mr. Jones:

Mercer County Housing Authority and its affiliated non-profit, Community Homebuyers, Inc., respectfully urge the Department to revise its proposed rule so as to exclude the first $50,000 of property value when seeking to recover the costs of Medicaid expenditures.

Since all property - including the primary residence of Medicaid recipients - that goes through probate is subject to DPW estate recovery, the proposed rule may have negative effects on neighborhoods. For example, the amount DPW recovers may exceed the home's value in areas where the market value of homes is low. Thus, heirs to property will likely abandon them if they cannot sell their properties for a positive return. In fact, the heir does not even have an incentive to probate their wills in the first place, creating spin-off problems when the inhabitant of the home cannot get a clear title to the property.

DPW has the opportunity to enhance the amount of cost recovered by being selective in the size of the estate it processes. By excluding the first $50,000 of property value, neighborhood stabilization efforts throughout the state are given a boost, and DPW maximizes the amount of money it recovers by focusing its efforts on the high-value estates of deceased Medicaid recipients.

We respectfully urge you to reconsider the proposed rule in light of these concerns.

Sincerely,

L. DeWitt Boesel

L. DeWitt Boesel
Executive Director
LDB/fg

80 Jefferson Ave., PO Box 683, Sharon, PA 16146 Tel: (724) 342-4000 Fax: (724) 342-4099

**COMMONWEALTH OF PENNSYLVANIA**
**DEPARTMENT OF PUBLIC WELFARE**
**OFFICE OF LEGAL COUNSEL**

**DATE:** August 18, 1999

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**SUBJECT:** Public Comment - #14-445

**TO:** Richard Sandusky
Director, Regulatory Analysis
Independent Regulatory Review Commission

**FROM:** Ruth O'Brien ROB.
Senior Assistant Counsel

Attached are public comments received August 17, 1999 on the MA Estate Recovery Regulations, #14-445.

Attachment

cc: Scott Johnson
Niles Schore
Sandy Bennett
Melanie Hauck

15

#14-445

*Elder Law Firm of*

**Marshall & Associates**

ATTORNEYS AND COUNSELORS AT LAW

*REPLY TO:*
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*303 Allegheny Street*
*Jersey Shore, PA 17740-1405*
*Telephone (570) 398-7603*

*Williamsport Office*
*49 E. Fourth Street, Suite 200*
*Williamsport, PA 17701-6355*
*Telephone (570) 321-9008*

August 18, 1999

Department of Public Welfare
Bureau of Financial Operations
Third Party Liability Section/Estate Recovery Program
AUG 23 1999
Received

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Charles Jones
Acting Chief
Third Party Liability Section
P.O. Box 8486
Harrisburg, PA 17105

Dear Sir:

RE: Comments, Objections and Suggestions in regard to Proposed MA Estate Recovery Program Regulations: Title 55 Chapter 258. (29 Pa.B. 3888)

I am an elder law attorney, and past Chair of the Pennsylvania Bar Association's Elder Law Committee. This letter is written to express concerns regarding the proposed regulations for the MA Estate Recovery Program as published at 29 Pa.B. 3888. In particular, I feel that the following sections will have significant adverse effects and/or are in conflict with existing federal and statutes and regulations:

- Section 258.3(f) regarding use of the Fraudulent Transfer Act
- Sections 258.11 (b) and 258.11 (d) regarding the employment of private attorneys and members of the public as collection agents for the Department of Public Welfare
- Section 258.7 Provisions regarding Collection against Surviving Spouse, Disabled Children and Minor Children
- Section 258.8 Liability of Personal Representative
- Proposed Section 258.12 Administrative Enforcement

In addition, in its description of "Affected Individuals, Groups and Organizations", the Department fails to even mention the individuals likely to be most affected by these rules: the poor and middle class elderly who are in need of health care covered by Medicaid, including home and community based services. The implication is that the Department has not yet even considered the negative effects of the proposed regulations on these individuals in fashioning the proposed regulations.

In the remainder of this letter I will present reasons why the I believe the above sections need to be revised or in some cases deleted in their entirety. At the end of this letter I present a number of related or additional issues that I feel should be addressed in these

regulations. Please note that the terms Medicaid, Medical Assistance, and MA are sometimes used interchangeably in this letter to refer to the Commonwealth's Medicaid program.

## Comments to Proposed Section 258.3 (f) The Fraudulent Transfer Act Provisions

Section 258.3(f) states: "Notwithstanding subsections (b)–(d), 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 reasonably equivalent value is recoverable for the estate."

This section attempts to reach outright gifts made by the decedent to anyone (apparently including spouse and minor and disabled children) 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 during lifetime, without full consideration, subject to the Department's claim.

By its terms Section 258.3(f) will require the executor or administrator of the decedent's estate to use the Pennsylvania Uniform Fraudulent Transfer Act (12 Pa.C.S. Chapter 51) to recover all such transfers for the benefit of 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 executor fails to pursue the Department's claims through use of the Fraudulent Transfer Act, the executor will be personally liable on the Department's claim (Section 258.8).

Transfers made within a year of the date of death are presumptively fraudulent under the Section, but transfers made prior to a year before death would be recoverable as well. 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.

At first glance 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 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(f) 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. 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 fact that these small estates will typically have few or no assets to use in pursuing such claims, does not appear to have been considered. Indeed, the regulations state that the "Department will not reduce its claim on account of attorney's fees or other costs incurred by the estate to obtain or liquidate assets." (Section 258.6(g)).

It should be noted that there is no dollar limitation on the Department's claim against fraudulent transfers so the Executor will be required to pursue even small transfers (e.g. a $250.00 donation to a church or other charity).

Specific Problems with Section 258.3(f) and Recommendations: **Section 258.3(f) should be deleted from the Proposed regulations** for the following reasons:

1. 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(f) 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?

2. Section 258.3(f) has been pre-empted by and conflicts with Federal laws regarding transfers of assets and Medicaid Estate Recovery.

A. Federal Law Regarding Estate Recovery.

1. 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). This is nothing new. Restrictions on State's rights to impose liens and institute recovery actions have been contained in the Medicaid statute since its enactment in 1965.

2. 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).

B. Federal Law Regarding Transfer of Assets. The federal Medicaid statute also has sought to preempt 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.

1. 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).

2. 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).

3. 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.

C. Thus, under the very clear 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 (f) 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(f). 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. State's are not permitted to try to get a 2nd bite of this apple through estate recovery. Section 258.3(f) attempts to do so through the artifice of the Fraudulent Transfer Act in violation of federal law.

D. Section 258.3(f) 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 in our enabling legislation, unless the Governor were to approve expansion to property covered in the more expansive alternative B above. 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"**.

1. The Department recognizes that under Pennsylvania law, the definition of probate estate is very limited. In its statement of significant provisions the Department proposes 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. Assuming arguendo that the Department is correct 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.
2. 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 limited to **assets in which the individual had any legal title or interest at the time of death (to the extent of such interest)**.
3. 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.
    1. 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. 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 are the only restrictions that may be applied to such gifts. To the extent that Section 258.3(f) applies to outright transfers, it violates federal law. It also violates the Pennsylvania enabling statute.

2. 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 cannot use the Fraudulent Transfer Act to reach these assets. It may, however, 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.

E. 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. Stadtler,* Court of Appeals of New York, decided April 6, 1999.

F. 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 asset and has spoken definitively as to how they are to be penalized. Congress through it 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(f)is a misquided 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)."

3. Section 258.3(f) conflicts with federal prohibitions on estate recovery during the life of spouse, minor (under 21) and disabled children.

As noted above, federal law defines the permissible scope of Pennsylvania's Medicaid Recovery. The federal limitations are mandatory. ( "No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the state plan may be made, except . . ." 42 U.S.C. §1396p(b)(1)).

Section 258.3(f) will apply to any asset transferred by the decedent without full consideration. There is no exemption in Section 258.3(f) for transfers to spouse, minor and disabled children. Indeed, by its specific terms the section applies to assets held in tenancy by entireties (i.e. with the spouse). Thus, use of the Fraudulent Transfer Act will include forcing the estate to assert claims against assets transferred during the decedent's life to his surviving spouse, minor or disabled child. The executor is required to recover these assets for the estate to enforce the Department's claim. Once assets have been recovered by the estate will be subject not only to the Department's claim but to all other estate related claims and expenses including taxes, executor's commissions, attorney fees and other administrative costs. Even if the Department's claim is postponed, the assets will have been reduced. The net result is that, due to the provisions of the Section 258.3(f) recovery will effectively have been made against the decedent's spouse, minor or disabled child, during the lifetime of those relatives. Such recovery will be in direct conflict with the federal mandate which provides that "Any 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 permanently and totally disabled... "42 U.S.C. 1396p(b)(2).

4. Section 258.3(f) will add significant confusion and uncertainty to the law regarding

the effects of transfers of assets.

A. Section 258.3(f) 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, if the transferor dies. 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 deemed fraudulent, makes no logical sense, and will add even more confusion onto 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 creates 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.

5 The fraudulent transfer section (Section 258.3(f)) 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.

A. 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. And 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(f) 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(f) 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 $500 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.

B. Section 258.3(f) 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, the section will create situations of immense complexity for executor's of small estates (and for surviving spouses and minor and disabled children, executors, attorneys representing estates, and the court system).

6. Debtor/Creditor law is inapplicable and inappropriate when applied in the context of public benefits

1. 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).

2. 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.

7. Section 258.3(f) 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(f) 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 6% 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 6%. 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(f). Perhaps not. But, I think I should at least point out that one unintended effect of Section 258.3(f) 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.

8. Section 258.3(f) 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(f) 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(f), 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(f) 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(f) 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(f) 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(f) 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(f)'s effects on transferees who pay full value, provided the can prove they did pay fair market value for the property received (Sec 258.9). But this just points out that Section 258.3(f) 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(f) 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 claim 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.

9. The meaning of the presumption created in Section 258.3(f) 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 or proof will in some situations be on the creditor. Thus Section 258.3(f) 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.

**Recommendation regarding Section 258.3(f):**
Section 258.3(f) 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 mandate 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(f) should be deleted in its entirety from the proposed regulations.

## Comments to Proposed Section 258.11 (b) and (d) Employment of Private Attorneys and Members of the Public for Collection Purposes

It is tempting to turn the work of collecting MER claims over to private attorneys and collection agencies, letting them keep a portion of what they recover. But the idea of having headhunters implement an extremely complex program against families of modest means raising very real concerns. Private companies won't know or care about undue hardship or compliance issues - their bottom line will be to extract every dollar possible, so unlawful collections may be rampant. This has been the experience in Ohio recently documented in a Cleveland TV station's expose. Included was an interview with a rather unsympathetic private attorney who makes over $250,000 a year as her percentage of collected estate recovery claims.

Hiring private attorneys and collection agents is likely to lead to unfair and inequitable application of estate recovery. Private collection agents will likely target the easiest collections, e.g. the poorer, often rural areas of the state where they are likely to encounter less resistance to collection. The collector, acting as estate administrators will not be subject to federal and state debt collection laws. Unchecked, abuses are likely to occur.

## Comments to Proposed Section 258.7 Provisions regarding Collection During Life of Surviving Spouse, Disabled Children and Minor Children

Congress specifically enacted an estate recovery exemption in favor of the surviving spouse and others. The language of the federal statute unambiguously forbids the state from proceeding with recovery during the lifetime of the protected survivors (spouse and

minor or disabled child). "Any 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 permanently and totally disabled... "42 U.S.C. 1396p(b)(2).

Section 258.7 will allow the state to take preliminary enforcement measures during the surviving spouse's lifetime to protect its unripe claim, even when doing so necessarily diminishes the spouse's economic benefit from the property. Stripping the surviving spouse of the economic benefit of an asset through the placing of liens and mortgages during the lifetime of the spouse amounts to an adjustment or recovery during the lifetime of the surviving spouse in contravention of the federal statute.

Consider, for a moment, the extent to which the surviving spouse will be deprived *during her lifetime* of the beneficial enjoyment of the property by the procedures required by Section 258.7. She cannot sell the property to "trade down" to more appropriate housing. She cannot mortgage it to raise funds for needed repairs. It is doubtful that she could rent it out, since the term of the lease would be unpredictably dependent on the date of her death. Lacking good title, she would be excluded from participating in the "reverse mortgage" program designed, ironically, to help seniors like her raise funds for living expenses. She could not sell and relocate to Florida or move in with a child without settling up with the state. She could not sell and move to an apartment in the hope of using the proceeds to generate needed income for her support. About the only property right she does enjoy, in this situation, is the right to live in the property until unpaid real estate taxes or deferred maintenance force her to sell out and pay up on the state's claim. Is this what Congress intended by the exemption of surviving spouse's from recovery during their lifetimes?

Surely not. Surely the postponement section (Section 258.8) frustrates the underlying purpose of the exemption. It logically leads to the repugnant spectacle of a surviving spouse living out an impoverished old age burdened by the healthcare debt of her deceased partner in life. Surely Congress never intended such a result, yet this is exactly the result that follows from Section 258.7. In effect, Section 258.7 limits the exemption to a right of occupancy in the surviving spouse. Surely if Congress had wished to so limit the surviving spouse's right, it would have drafted the statute in such terms. It did not.

The possibility that the Department "may" grant a hardship waiver in some cases, is hardly a curative. The hardship language has been in the statute since the start of estate recovery in 1994. How many hardship claims has Department granted over that five years. The question needs to be asked. My speculation is that the answer is probably very few. In reality, it is unlikely that an elderly surviving spouse will be even aware of the possibility of seeking a hardship waiver even if given "notice" of the right to do so.

It should be noted that the Pennsylvania's enabling statute provides no authorization for the onerous "postponement" provisions of Section 258.7. (See 62P.S. §1411)

Section 258.8 amounts to a penalty for failure to plan. Assets could have been transferred to the surviving spouse during lifetime with no transfer penalties. The estate recovery provisions should follow this path. I recommend that there should be no recovery from assets passing to surviving spouse, minor or disabled child. The postponement provisions

of Section 258.8 should only apply to assets passing from the decedent's probate estate to persons other than surviving spouse, minor or disabled child. For example, if decedent leaves 1/3rd of his estate to his surviving spouse and the remainder to his adult and not disabled child, recovery should be taken (though postponement is required) from the share passing to the child, but not from the share passing to the spouse.

In the alternative, if recovery is to be permitted from the surviving spouse, it should only be permitted as an estate recovery - that is, recovery should only be permitted from the estate of the surviving (community) spouse upon the death of the surviving spouse. Her title should not be encumbered during her lifetime. The surviving spouse should be free to sell, encumber, and otherwise transfer the property during her lifetime. Recovery, if any, should be postponed until her death. This latter alternative would appear to be consistent with the federal protection afforded the surviving spouse in the federal statute.

## Comments to Proposed Section 258.8 Liability of Personal Representative

Section 258.8(d) which requires a court approved decree of distribution should be revised. In Pennsylvania, most small estates are settled by Informal (sometimes called "family") Settlement Agreement rather than formal Court Accounting and Court ordered decree of distribution. Settlement of estates by informal settlement of the parties, are favored by the law. See, *In re Estate of Brojack*, 321 Pa. Super. Ct, 154, 467 A.2d 1175 (1984) and cases cited therein. They avoid unnecessary use of limited court resources, avoid delay and added expense, and allow for earlier distribution of assets to heirs. As a lawyer who does a substantial amount of estate administration work, I can report that over 90% of my estates are settled informally by agreement of the parties, including executor, creditors, and beneficiaries.

Over the last four years it has frequently been my experience that all of the assets of a small estate (after payment of funeral and administration expenses) are paid to the Department in payment of the estate recovery claim. My procedure has been to send an informal accounting along with a check for the residue (after administration and funeral expenses) to the Department. This has been an easy, efficient, and cost effective means of settlement. It doesn't make sense in these small estate situations to require resort to formal court processes, pay extra filing fees and advertising costs, and then wait to remit the estate to the Department. The Department will receive less, and will be paid later. And there will be added work for attorney and personal representative, making it harder to find attorneys and personal representatives who are willing to serve.

Thus, requiring small estates which are subject to Department claims to go through formal court accounting seems unnecessary and burdensome. As long as the Department is made a party to the informal settlement agreement, the Department's interests will be protected, and the estate can close more quickly, with less expense and with less use of court resources. If the Department is not satisfied with the terms of the informal settlement agreement, it may refuse to sign and compel a formal accounting. *Morgan Estate*, 8 Fid. Rep. 86 (1957). I suggest that Section 258.8 be revised to provide for informal settlement with approval by the Department as an alternative to formal court accounting and decree of distribution.

## Comments to Proposed Section 258.12 Administrative Enforcement

Section 258.12 provides that "in addition to any other remedies allow by law, the Department may administratively assess liability upon a personal representative or transferee" and that "a final administrative order in any proceeding to assess liability against a personal representative or transferee shall be binding upon the parties in any subsequent judicial proceeding to enforce the administrative order".

Frankly I am not clear on the implications of this confusing and worrisome provision. Is not the appropriate forum for actions involving an estate the Orphans Court and the probate proceeding? Does Section 258.12 in effect create two different forums in which executors and transferees must adjudicate the Department's claim? Should not all claims, including the Department's claim be adjudicated at the same time and place, in the Orphans Court. Doesn't Section 258.12 conflict with 20Pa.S §3323(a) which authorizes the executor to petition the court for an order authorizing the compromise or settlement of any claim by or against an estate?

The problems raised by Section 258.12 are perhaps even more significant with transferees. Procedures for this final and binding administrative imposition of liability by the Department are not set forth in the regulations, but questions of Constitutional proportions abound. A final administrative order which is binding in subsequent judicial proceedings has the potential to deprive transferees of their property rights. This raises serious questions of notice and due process rights. See, for example, *DeMille v. Belshe*, 1995 WL23636 (N.D. Cal); Medicare and Medicaid Guide (CCH) ¶43,082. How is notice to be given to the persons affected? What about content and clarity of the notice? Is notice to the personal representative to be construed as notice to all affected transferees? Who receives notice of hardship criteria?

I recommend that Section 258.12 regarding Administrative enforcement "in addition to other remedies allowed by law" be deleted in its entirety. It duplicates and potentially conflicts with existing laws and procedures regarding the enforcement of claims by and against estates of decedents, is unclear in its purpose and effect, and it raises serious notice and due process issues.

## Comments to Notice of Proposed Rulemaking: "Affected Individuals, Groups and Organizations"

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 program through provisions like Section 258.7 [encumbering the surviving spouse's assets] and Section 258.3(f) [fraudulent transfers] these regulations will almost certainly deter many older persons from seeking needed health care treatments.

From personal experience I can relate that there are already many elderly in NorthCentral 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. I know of no documentation of this effect in Pennsylvania. To the best of my knowledge, it has never been studied or even considered in Pennsylvania. However, this very real problem is well recognized in other states.

In September 1996, AARP published "Medicaid Estate Recovery: A Survey of State Programs and Practices". The survey of key state Medicaid officials was conducted from November 1995 through February 1996. Also surveyed was one legal practitioner identified as an expert in Medicaid in each state. One of the questions requested comments on the effect of Medicaid estate recovery on low-income older individuals. The Medicaid officials and practitioners who responded "were in general agreement that the group most affected was individuals who spent down their assets on medical care - often middle class individuals." AARP "Medicaid Estate Recovery: A Survey of State Programs and Practices", pg 42.

The AARP survey goes on to report that "state officials commented that the program may have a chilling effect on applications for benefits. For example, the Georgia official reported that while the program is not yet in effect, some families in anticipation of recovery may be 'refusing to get the medical care they need.' Maine reported that fear of estate recovery had caused many 'to drop or not seek Medicaid coverage.' South Carolina expressed concern that the program may prevent some from applying and 'has caused some recipients to withdraw.' Wyoming commented that people are 'delaying applying for and receiving benefits.'" AARP "Medicaid Estate Recovery: A Survey of State Programs and Practices", pg 43.

The practitioners also reported the chilling effects of Medicaid Estate Recovery asserting that "the poor are so frightened of losing their homes that they forego needed services. New Mexico, for instance, noted that many low-income individuals own modest homes and may hesitate to institutionalize spouse or relatives because they do not want to lose family lands. The Ohio practitioner maintained that the program 'conjures up a fear of the unknown that discourages the elderly from seeking Medicaid assistance.' The Nevada practitioner claimed the idea of recovery 'scares the elderly and effectively delays their entry into the program until they are in crisis.' " AARP "Medicaid Estate Recovery: A Survey of State Programs and Practices", pg 43.

For your further information on this subject I have attached information from Wisconsin documenting the existence of this very real negative impact of estate recovery. (See articles from Milwaukee Sentinel and The Journal, and various letters including a letter from Governor John Engler, copies of which are attached to this letter).

The evaluation of the proposed regulation's impacts on the health and well being of older Pennsylvanians should be a paramount consideration. But these effects have apparently not been considered by the drafters of the proposed regulations. They need to be. I request that in reviewing the proposed regulations, the reviewers and the Department consider the negative impact that expanding estate recovery beyond the minimum required by law will have on the public health, safety and welfare of Pennsylvania's elderly population. The benefits of the expansion brought about by the regulations should be weighed against the harm that will be caused to hundreds and thousands of Pennsylvania seniors.

## Other Recommendations for Changes in the Regulations

- The regulations should state that claims are limited to probate assets - that is, to assets which pass through probate (whether by will or intestacy) and are therefore under the control of the personal representative. Recovery should not be applied to assets which pass outside of probate, such as the assets listed in Section 258.3 (b) through (e). Transfer of these assets are controlled by federal law.

- The regulations should state that the liability of the personal representative is limited to assets under the control of the personal representative (i.e. the probate estate), and is limited to a negligence standard, rather than strict liability.

- Recovery claims should be limited to assets in which the decedent held a legal interest at the time of death.

- Section 258.3(f) regarding fraudulent conveyance should be deleted from the Regulations in its entirety. 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)."

- Recovery claims should be waived entirely for any assets passing to a surviving spouse or disabled or minor (under age 21) child. There should be no postponement in regard to assets passing to these persons.

- Recovery claims should be waived in regard to decedent's home if there is a sibling who lived in the decedent's home for at least a year before the decedent went into a nursing home and who has lived there continuously since the date of the nursing home entry.

- Recovery claims should be waived in regard to decedent's home if there is a child or grandchild who resided in the decedent's home for two years before the decedent went into a nursing home and whose care giving helped postpone institutionalization.

- The Department should waive its claim if the claim is for less than $2,400 or if the total value of the decedent's probate estate is less than $2,400.

- The Department should waive its claim against the household goods and furnishings and personal effects of the decedent.

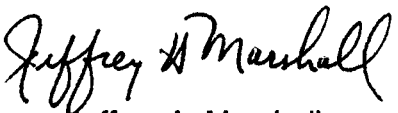
- Section 258.10. Undue hardship waivers. Subsection 258.10(b) is unclear. Will the Department waive its claim only if all three of the described circumstances exist, or if any one of the circumstances exist? The subsection should provide for the latter, by adding the conjunctive "or" at the end of Section 258.10 (b)(1) and Section 258.10 (b)(1).

There is not much money involved here compared with the costs and burdens that will

result from these regulations (especially the fraudulent transfer and postponement provisions). In its discussion of the need for the regulations DPW notes that "the estate recovery program has generated in excess of $25.3 million since its inception in August 1994. The Department anticipates that these proposed regulations will slightly increase revenues due to better compliance with estate recovery requirements." $25 million dollars in over 4 years is not a significant percentage of the Medicaid expenditures made by the Commonwealth of Pennsylvania. Is it worth it to "slightly increase" these revenues at the cost of jeopardizing the health of many of our elderly. Is it worth subjecting surviving spouses and other family members to these onerous government intrusions? Can this projected slight increase in revenues justify the numerous burdens, complications, costs, and uncertainties the proposed regulations, especially the fraudulent transfer provision, will visit on the citizens of Pennsylvania? Surely not.

I feel that it is essential that Pennsylvania examine the efficiency, social impact, burdens, complications, fairness, and especially the effects of the proposed regulations on the health and well being of our elderly before implementing them. Surely the proposed regulations do not represent the least burdensome alternative. I hope that this letter will assist the Department and other reviewers and will bring about a recognition of the need to modify the regulations to create a more reasonable, rationale, moderate and workable system. I appreciate the opportunity to comment on the proposed regulations, and your consideration of my concerns.

Sincerely,



Jeffrey A. Marshall

enclosures

cc: 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

Milwaukee Sentinel

SATURDAY MORNING November 23, 1991

★ ★ ★ ★ EDITION

# Elders turn down health assistance

## New law could force liens on homes

By STEVEN WALTERS
Sentinel Madison Bureau

Madison — Older Wisconsin residents have begun turning down Medical Assistance programs so liens won't be filed on their homes or claims against their estates under a new law, officials said Friday.

There is an "alarming trend in older people turning down MA eligibility" and / or refusing much-needed community care, said Thomas L. Frazier, executive director of the Coalition of Wisconsin Aging Groups.

Some elderly residents want to avoid the new Estate Recovery Program under which, in a few weeks, officials will begin filing liens against homes and claims against estates to recover Medical Assistance costs — mainly nursing home costs.

"All the (elderly) who stand to lose something are quite concerned," said Crawford County social worker Greg Klemm.

So far, Klemm said, about one in three Medical Assistance recipients in Crawford County may be affected by the new law.

"Estates will be reduced or wiped out, depending on the (nursing home or community services) costs they rack up," added

See Liens / 9A

# Residents turn down medical aid

## Liens

From 1A

Marvin Diedrich, director of Fond du Lac County's Social Services Department.

Klemm told this story to illustrate the trend:

An 83-year-old Prairie du Chien woman sat sobbing before Klemm as she turned down tax-funded personal care in her home to avoid the estate-recovery law.

The woman rejected a Medical Assistance program in which a nursing assistant would have visited her daily to help her bathe, keep house and shop.

She did so to avoid the estate-recovery law, which she said would allow things she had "worked so hard for" to be taken from her family after her death.

She recently had been discharged from a hospital after her third heart attack, but suffered from heart failure, phlebitis and severe arthritis.

Now, she is relying "as best she can" on other family members, who have their own families and careers, to help her remain in her home, Klemm said.

Estate recovery was added to the 1991-'93 state budget to begin to recover some tax funds for the state's Medicaid program, which has exploded in cost — from $1.1 billion to $1.8 billion — in four years.

The Medicaid share paid by Wisconsin taxpayers also shot up in that same period, from $470.2 million to $714 million.

Wisconsin began estate recovery, joining more than 20 other states that do so, after the Legislature changed state law to allow more residents to qualify for Medicaid benefits, including nursing care.

That change allowed "middle-class" residents, for the first time, to qualify for nursing home care, officials said.

Estate recovery was requested in February by Gov. Tommy G. Thompson and added to the state budget by Democrats who control the Legislature.

Gerald Whitburn, secretary of the State Department of Health and Social Services that will administer the program, said Friday estate recovery was controversial, but needed.

"Without programs like estate recovery, the rate of increase in Medical Assistance will be even greater, and we simply do not have the money to cover that," Whitburn said.

Thompson and legislators added enough restrictions on the program to make sure Medical Assistance recipients or their spouses are not "hurt" by the program, Whitburn added.

Also, officials said, the liens will be filed only if the person is not expected to be able to return home. If the Medical Assistance recipient returns home, the liens will be removed.

The Estate Recovery Program is expected to collect about $14 million in the next 18 months, most of it to offset nursing home costs that can run between $20,000 and $25,000 a year, officials said.

Frazier said the coalition of aging groups did not oppose filing liens or claims on estates to recover nursing home costs.

But the group, in a letter to Thompson, asked the governor to eliminate from the state recovery program the requirement that recipients who remain in their homes and get medical care locally also can be subject to liens.

When elderly remove themselves from community care programs to avoid estate recovery, they get sicker sooner and will be forced into "expensive institutions where their care will be totally funded by Medical Assistance," Frazier wrote Thompson.

Under the program, county workers will interview Medical Assistance recipients and forward the results of those interviews to state officials, who will file the liens and estate claims.

To reimburse them for expenses, county governments will get to keep 5% of what is collected under the program, officials said.

State officials will "match" information on MA recipients compiled by the counties with information from death certificates, officials said.

In some cases, the amount to be recovered under the program will be "kept open," as nursing home costs to care for the recipient accumulate, officials said.

THE JOURNAL
Sunday, December 15, 1991 — Latest Edition

Health care

# Elderly face lien threat on homes

*State will try to recover state Medical Assistance money from estates*

By FRAN BAUER
of The Journal staff

Despite growing opposition, officials plan soon to begin enforcing a new law that allows the state to file liens on the homes of elderly residents who have received Medical Assistance payments.

The aim is to recover some of the hundreds of millions in tax dollars used annually to provide health care to the poor, the needy aged and the disabled.

The filing of the liens will mark the first use of the state's Estate Recovery Law, which took effect Oct. 1. Under the law, the state cannot collect on the liens until the person receiving Medical Assistance and the person's spouse die, or as long as any minor or disabled children remain in the home.

The state Medical Assistance Program, also known as Medicaid, was created in 1965 to provide medical services to the poor and the medically needy of any age — essentially, those who cannot afford adequate medical care. It is financed jointly by the state and federal governments.

In the course of a year, one of every 10 Wisconsinites is now served by the program, according to Health and Social Services Sec-

*Please see* **Homes** *page* **26**

# Homes/State to start enforcing law to put liens on residences of elderly

*From page 1*

retary Gerald Whitburn.

Medical Assistance is distinct from Medicare, the well-known Social Security program for which all persons become eligible at age 65.

### Opposition Grows

The so-called "lien law" was approved with very little discussion as part of the budget bill this year. But now it is facing a groundswell of opposition.

County officials who must help the state by interviewing elderly people on Medical Assistance are dragging their feet, and in at least one county, officials are flat-out hoping that the bill will be repealed before liens are filed on any estates.

Last week, Fred Risser, president of the state Senate, announced that he would introduce a bill to eliminate the law when the Legislature reconvenes Jan. 28.

"The idea came from the governor and was part of his budget bill and slipped through with a lot of other things. But it is quite cruel to a small segment of the population. It doesn't seem that it would bring in that much money for the state, once administrative costs and investigations are paid for," said Risser (D-Madison).

"It seems like a harsh measure against a certain segment of the population that is generally very proud, and has been able to get by, survive, and have one asset [a house] they've tried to protect for themselves and their families."

Stephanie Smith, the governor's press secretary, took issue with Risser's assertion that the lien provisions had "slipped through" in budget deliberations. She noted that "the Legislature had the governor's budget in February, dissected it and passed it in July. They had months to consider it."

### Delayed Start

Because of technical and legal kinks in the bill, the Department of Health and Social Services had delayed starting the program until Dec. 1 and is only now sending out a brochure and newsletter explaining the law.

The law allows the state to get a court-ordered lien on the home of an elderly person who incurred Medical Assistance costs, either while living at home or in a nursing home, after Oct. 1, 1991.

There are conditions: The state can seek a lien only if a nursing home resident isn't expected to return home and has no spouse or disabled, blind or minor child living at home. The state can collect on the liens only after both the aid recipient and spouse die, or when the house is sold.

The Coalition of Wisconsin Aging Groups, an advocacy organization for the elderly, has asked the governor to stop the law from being used. The group opposes the section allowing the state to file a lien against the estates of people over 65 who still live at home and receive Medical Assistance. However, it has decided to take no stand on the state's plans to recover nursing home costs after an elderly person dies.

The coalition, along with other elderly groups, says it monitored the bill in the Legislature and believed at the time that enough restrictions had been placed on it to protect elderly residents who receive Medical Assistance and still live at home.

Rep. Margaret Krusick (D-Milwaukee), chairwoman of the Assembly Committee on Aging, said legislators did not oppose the bill because the lobby groups for the elderly did not seem concerned about it.

"I inquired with the elderly advocacy groups, and at the time they were not opposed," Krusick said. She said she personally had been concerned, but there was "minimal" discussion of the lien law because there were other issues the advocacy groups were more interested in.

But the coalition now fears frail older persons will turn down needed health care because of the lien law and wind up getting much sicker and having to go to a nursing home sooner.

Gov. Tommy G. Thompson has agreed to meet with coalition members, but the session has not yet been scheduled, according to his press secretary.

"The governor is open to modifying it," Smith said.

But she said similar laws were in use in other states for the same reason Wisconsin was trying it.

"Basically, the costs of Medicaid are growing by such leaps and bounds, and the state is in a position where we can't afford not to do it," she said.

Those costs are expected to reach $738.9 million this year and $766.7 million next year. Medical Assistance programs will run up a deficit as high as $86.2 million during the 1991-'93 budget period, according to state estimates.

The state estimates it will recover $13.4 million a year from deceased nursing home patients and $1 million from people over 65 who received Medical Assistance at home.

The Medical Assistance budget now surpasses state funding for the whole University of Wisconsin System.

The lien law already has turned into a nightmare, especially for those over 65 who remain at home, according to Betsy J. Abramson, an attorney for the Coalition of Wisconsin Aging Groups. She has documented dozens of cases of older people who chose to go without the medical care they needed, she said, rather than risk not being able to give their homes to their children when they died.

Among them:

- An older widow in Shawano County who has for years cared for her 96-year-old mother in the mother's $23,000 house has discontinued Medical Assistance services that used to offer her some respite because she is counting on the home for security in her own old age.
- In Dane County, a woman who lives at home with her siblings and receives Supportive Home Care refused to switch to Medical Assistance, which also would have covered costs of her prescription drugs. She fears her brother will have nowhere to live after she dies if the state imposes a lien on her home.
- In Vernon County, a couple in their 70s refused Medical Assistance, though the wife has been disabled for years. The couple could have saved $439 a month by using Medical Assistance. Instead, all but $83 of their monthly income of $672 is spent on medications, insurance and their mortgage.
- In Crawford County, an older woman who suffers from phlebitis, severe arthritis and congestive heart failure also turned down Medical Assistance even though she has trouble walking and must change position every 15 minutes. She sobbed after hearing that services were available only if she agreed to a lien on her home, according to social worker Greg Klemm.

Abramson contends the lien law is doing all the wrong things. Wisconsin has pioneered in providing home care as an alternative to far more expensive care in nursing homes, she said. As a result, Wisconsin's nursing home population decreased by 19% in the 1980s, compared with an increase of 24% nationwide — sparing Wisconsin taxpayers much of the cost of nursing home care, which averages $21,000 to $25,000 a year per patient.


# COALITION of WISCONSIN AGING GROUPS

1245 East Washington Ave., Suite 166
Madison, WI 53703
Phone (608) 257-0023
Thomas L. Frazier, Executive Director

## RATIONALE FOR PARTIAL REPEAL OF ESTATE RECOVERY LAW AS IT RELATES TO COMMUNITY-BASED CARE

*(1) Recovery of MA payments made for community-based care represents bad public policy.*

*Will create disincentives for receipt of community-based long-term care. (See letters.)

*Undermines Governor's highly successful efforts in leading the nation in decreasing rates of institutionalization at a time the elderly population is increasing.

*Will result in increase in preventable institutionalizations, thereby increasing MA expenditures.

*Applicability only to persons age 65 and over is age discrimination.

*(2) Creating serious administrative problems for counties.*

*Counties have not been adequately trained on procedures.

*Counties "going back on word" to existing MA eligible population.

*Administrative costs of recovery for counties are inadequately funded.

*(3) Provisions will lead to increase in financial elder abuse and divestment.*

*Loopholes still exist - those with lawyers will find them.

*Children who feel "entitled to inheritance" will force transfers, constituting elder abuse in some cases.

*Exempting community-based care would preserve adult children's incentives to assist parents receiving long-term care in the community.

*(4) Provisions undermine efforts to develop private sector long-term care financing tool: Home Equity Conversion.*

*Coalition working with aging network and state Division of Housing to make home equity conversion available in Wisconsin. Two lenders already on board.

*(5) Coalition position for exempting only community-based care represents reasonable compromise.*

*In the projected $766M MA budget, $13.4M expected from nursing home, $1M from community - less than 1/10 of 1% of total.

*SB 428 (Risser repeal bill) being co-sponsored by both Democrats and Republicans.

1/9/92

This tradition will conflict with WI Bill 39 and will lead to the erosion of the safety and health of Wisconsin's elderly population, as evidenced by this client's previously mentioned choices.

Respectfully submitted,

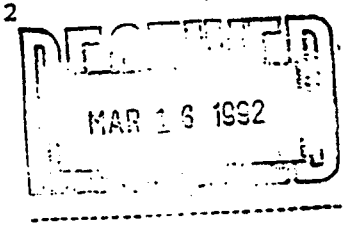
Greg Klemm
Social Worker II

BA

# Chippewa County Department of Public Health

2829 County Trunk I • Chippewa Falls, WI 54729 • (715) 723-0391

March 11, 1992




Elder Law Center
1245 E Washington Avenue
Suite 166
Madison, WI 53703

To Whom It May Concern:

I understand that your organization is interested in documenting cases of the effect of the Medicaid Estate Lien Bill on recipients or potential recipients of Wisconsin Medical Assistance.

As a social worker for the Chippewa County Home Care program, I recently made a visit to an elderly couple in rural Chippewa County who have very limited income and soaring medical bills from a recent cardiac arrest and subsequent 18-day hospitalization. The couple have a combined income of $589 per month and cannot afford to purchase a supplemental insurance to their Medicare.

I urged them to apply for Medical Assistance to cover their medical bills, but they refused due to fears that they would have a lien put against their home and, therefore, not be able to pass their home directly to their children. I did place them on Partner Care, but that will make little difference in their overall expenses. They are planning to pay their medical bills entirely without assistance--at a rate of $20-50 per month, placing them deeply in debt.

Thank you for documenting this and similar cases and for your efforts to assist people in these situations.

Sincerely,

Jane Poynter

Jane Poynter, M.S.W.

JP:bh

Eau Claire County
DEPARTMENT ON AGING
721 Oxford Ave.
Eau Claire, Wisconsin 54703
(715) 839-4735

Nutrition Program
839-4886
Volunteer Services
839-4763

Benefit Specialist
839-6211
Information & Referral
839-4750

November 29, 1991

Governor Tommy Thompson
State of Wisconsin
State Capitol
Madison, WI 53702

RE: Medical Assistance Estate Liability Law

Dear Governor Thompson:

Many issues have been raised by the Medical Assistance Estate Liability Law by individuals who work with the older people, as well as older people themselves. I am very concerned that the effect of this policy changes on MA eligible older people will create a disincentive for them to agree to accept care that they are eligible for.

One of the goals of the Aging Network is to assist older people to secure needed services that will enable them to remain in their own homes. This policy change defeats our efforts in this regard. By denying needed services, the health of these older people will deteriorate, forcing them to enter a long term care facility where their care will be totally funded by Medical Assistance.

I further question the decision that was made to make this policy change retroactive to October 1, 1991. Program beneficiaries were not made aware of this change, and I feel it violates their right of being informed of any changes in their care or method of payment of this care.

In my years of working for, and with, the elderly, I have been proud of the fact that Wisconsin has been a leader in services for older people, but this new change, in my opinion cheapens this image. I respectfully suggest that you include repeal of this law for individuals who receive community-based care.

Sincerely,

Lynda Brehm
Director

cc: Gerald Whitburn, DHSS
Senator Marvin Roshell
Senator Rodney Moen
Representative Dave Zien
Representative Terry Musser
Representative Joseph Hisrich
Thomas Franzier, Coalition of Wisconsin Aging Group

LB:mr

## APPENDIX 3

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

JOHN ENGLER
GOVERNOR

June 24, 1994

The Honorable Donna Shalala, Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Secretary Shalala:

I am writing to bring your attention to an issue of great concern to Michigan's senior citizens. On August 10, 1993, President Clinton signed into law the Omnibus Reconciliation Act of 1993 (P.L. 103-66). The law, as passed by the Congress and signed by President Clinton, contains a provision which requires the states to institute a program of estate recovery.

My visits with Michigan's older citizens indicate that the federal estate recovery requirement has frightened them. Michigan's seniors and people with disabilities are concerned that if they accept Medicaid long-term care services today, they will not know what the financial consequences for their loved ones will be tomorrow.

On June 1, 1994, Dr. Gerald Miller, Director of the Michigan Department of Social Services, advised the Regional Office of the U.S. Department of Health and Human Services that the State of Michigan could not implement an estate recovery program at this time. We are currently waiting for the federal government to promulgate rules. After rules are promulgated, the Michigan Legislature will hold hearings before enacting legislation to implement estate recovery.

The estate recovery provision was part of President Clinton's fiscal year 1994 budget. Since nearly a year has passed since enactment of this provision, I would like to know if the Administration has any plans to revisit this issue?

Thank you for your time and consideration of this matter. I look forward to your response.

Sincerely,

John Engler
Governor

JE:ss