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#14-445

August 20, 1999

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

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

Dear Mr. Jones:

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

I. SECTION 258.3(F) IS NOT VALID

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

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

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

A state statute or regulation is invalid under the Supremacy Clause of the Constitution if (1) Congress states so in express terms; (2) the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation; or (3) where state law conflicts with federal law. California Federal S. & L. Assn. v. Guerra, 479 U.S. 272 (1987). When measured against either of the three standards, it is clear that federal law preempts §258.3(f).

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

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

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

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

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

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

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

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

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

B. Other Objections Regarding Section 258.3(f)

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

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

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

Second, the regulation provides no exception for transfers that are specifically permitted under federal Medicaid law. For example, spouses are permitted to make penalty-free transfers to each other. In fact, under 55 Pa.Code §178.125(b), DPW **requires** an institutionalized spouse to transfer certain assets to the community spouse in order to become eligible for Medicaid. Under the presumption created by §258.3(f), these spousal transfers would be deemed fraudulent. Even if they occurred more than 1 year prior to death, they would be subject to recovery under 258.3(f). Likewise, holiday and birthday gifts to family members and contributions to charity within 1 year of death would also be deemed fraudulent.

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

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

II. Conclusion

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

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

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

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

Very truly yours,

Robert Clofine

enclosures

cc: The Honorable Harold F. Mowery, Jr.
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Harrisburg, PA 17120

The Honorable Dennis M. O'Brien
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DEPARTMENT OF PUBLIC WELFARE
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INDEPENDENT REGULATORY REVIEW COMMISSION

DATE: September 20, 1999

SUBJECT: DPW Regulation 14-445 (#2043)
Medical Assistance Estate Recovery
Follow up Response to Question 20

TO: James M. Smith
Regulatory Analyst
Independent Regulatory Review Commission

FROM: Ruth O'Brien ROB.
Senior Assistant Counsel

I am writing to follow up on DPW's response to Question 20 raised in the list of questions faxed to DPW by IRRC on September 13, 1999. I am also responding to a verbal follow up question raised by Niles Schore, Esquire, regarding authorization of personal representatives to enter mortgages against real estate pursuant to proposed Section 258.7(c)(1).

Section 258.7 Postponement of collection.

Question 20: In subsection (c), how is a security interest perfected against smaller items? How are the items appraised? How were the $10,000 and $50,000 limits established?

Answer: Security interests are generally perfected against smaller property by filing in accordance with the procedures of the Uniform Commercial Code. *See* 13 Pa.C. S. Section 9302. It is the responsibility of the personal representative to secure an appraisal of property if a question arises as to whether the asset is worth enough to be protectable. With respect to how the Department established the $10,000 and $50,000 limits, we note that the Department recognizes the inherent difficulties in dealing with liens on personal property because of problems associated with keeping track of and collecting from such liens. This is especially so with respect to depreciable personal property, such as a car, which may have very little value at the time of the death of the surviving spouse or disabled or blind child. We do not believe, however, that Federal law allows us to ignore personal property of significant value which is part of the estate. (*See* HCFA, State Medicaid Manual, 3810.B.1, which provides: "At a minimum, you must include all real and personal property and other assets included within the individual's estate as provided in your State probate law.") Accordingly, we established the dollar limits of $10,000 and $50,000 because those were the largest dollar limits that we felt we could justify to the Federal government on a cost-effectiveness rationale.

In addition, Niles Schore raised another question as a follow up to question 20.

Proposed section 258.7(c)(1) provides that if the decedent's estate contains real estate, the personal representative will be deemed to have complied with his responsibilities to protect the Department's claim during the postponement period if the personal representative causes a mortgage or other recorded encumbrance to be placed against the real estate in favor of the Department. Mr. Schore inquired whether court approval is required under the Probates, Estates and Fiduciaries Code to allow the personal representative to enter a mortgage against real property that is required to be protected during the postponement period. The Department believes that the PEF Code is not clear on this point. The PEF Code gives the personal representative the power to sell realty without court approval, and, as a result, in some counties, the practice is that the power to sell includes the power to mortgage. *See* 20 Pa.C. S. 3351. However, the PEF Code also has a specific provisions which says that the Court can authorize a mortgage if the personal representative lacks power to do so. *See* 20 Pa.C. S. 3353. DPW's rationale for requiring mortgages is to allow the personal representative to protect DPW's interest while closing out the estate. If mortgages are not used, there is no way to comply with Federal law unless the estate is kept open until the surviving spouse dies or the minor child reaches age 21. In the case of a diasabled or blind child, the estate would have to be kept open until the death of the disabled or blind child.

I hope that this response is helpful. If I may be of further assistance, please do not hesitate to contact me.

cc: Mary Wyatte, Esquire
Niles Schore, Esquire
Scott Johnson
Sandy Bennett
Melanie Hauck
Jean Graybill, Esquire
Kelly Isenberg, Esquire

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Appendix 9-1

State Medicaid Manual
Part 3–Eligibility

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DEPARTMENT OF HEALTH AND HUMAN SERVICES
HEALTH CARE FINANCING ADMINISTRATION

TRANSMITTAL NO. 63—SEPTEMBER 1994

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

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

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

3810. MEDICAID ESTATE RECOVERIES

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

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

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

Permanently institutionalized individuals are persons of any age who are inpatients in a nursing facility, ICF/MR, or other medical institution as defined in 42 CFR 435.1009, and who must, as a condition of receiving services in the institution under your State plan, apply their income to the cost of care, as provided in 42 CFR 435.725, 42 CFR 435.733, 42 CFR 435.832, and 42 CFR 436.832. You must specify in your State plan the process by which you will determine that an institutionalized individual cannot reasonably be expected to be discharged from the medical institution and return home, the notice to be given the individual, the process by which the individual will be given the opportunity for a hearing, the hearing procedures, and by whom and on what basis the determination that the individual cannot reasonably be expected to be discharged from the institution will be made. States are not required to use the supplemental security income intent to return home rule for purposes of determining whether an individual is permanently institutionalized for purposes of estate recovery. This rule applies only to eligibility determinations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. *Notice.*

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

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

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

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

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

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

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
OFFICE OF LEGAL COUNSEL

DATE: August 25, 1999

ORIGINAL: 2043
MCGINLEY
COPIES: Sandusky
Markham
Smith
Wilmarth
Wyatte

SUBJECT: Public Comments - #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 24, 1999 on the MA Estate Recovery Regulations, #14-445.

Attachment

cc: Scott Johnson
Niles Schore
Sandy Bennett
Melanie Hauck

Original: 2043
McGinley
cc: Sandusky
Markham
Smith
Wilmarth
Legal

(25)

Pittsburgh Care Partnership, Inc.
PO Box 156, 1305 Fifth Avenue
McKeesport, PA 15134
412-664-2403
412-664-2089 (fax)

#14445

LIFE McKeesport : A program of the Pittsburgh Care Partnership, Inc.

August 24, 1999

Mr. Charles Jones
Acting Chief, DPW
Third Party Liability Section
PO Box 8486
Harrisburg, PA 17105

99 AUG 27 PM 2:21

Dear Sir :

I have read the proposed rulemaking for the Department of Public Welfare on the Medical Assistance Estate Recovery Program [55 PA. Code CH. 258]. Please accept the following as my comments.

It appears that the Commonwealth has followed the Federal rules very closely and has carried through on the Department's stated intent to establish the minimum program required by Federal law. Any significant concern I have with these rules I can reference straight back to the federal law. As a provider to the population affected by the estate recovery act, I commend the Department of Public Welfare for not taking a more aggressive posture in enacting this federal mandate.

Sincerely,

Ransom Towsley

Ransom E. Towsley
Executive Director

(22)

#14-445

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Original: 2043
McGinley
cc: Sandusky
Markham
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Wilmarth
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August 24, 1999

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

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

Dear Mr. Jones:

I am an elder law attorney and current Chair of the Pennsylvania Bar Association Elder Law Committee and the Montgomery County Elder and Disability Law Committee. Proposed regulations were published on July 24, 1999 interpreting Section 1412 of the Public Welfare Code, the Medical Assistance Estate Recovery Program. I have a number of concerns.

The presumption, under Section 258.3(f), that any transfer of assets which a decedent made within one year of death for less than reasonably equivalent value is recoverable for the estate, is particularly troubling. Federal law specifically permits certain transfers to a spouse or disabled child.

I have reviewed Jeffrey A. Marshall, Esquire's comments, objections and suggestions and concur with nearly all of his comments. He did a very thorough job of reviewing the issues. Please review his suggestions carefully.

Very truly yours,

Lois A. Nafziger

Lois A. Nafziger

LAN:bab
-losure
y A. Marshall, Esquire
/-Regulations0824

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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 20, 1999

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, Dísabled 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 tō 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).

2. 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.

3.

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.

4. 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 propôsed 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 àt 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.

6. 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.

1. 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.

1. 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.

2. 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

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#14-445

My rainbow...token of the covenant between Me and you...for perpetual generations

Philadelphia Geriatric Center

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Original: 2043
McGinley
cc: Sandusky
Markham
Smith
Wilmarth
Legal

August 24, 1999

1999 AUG 27 PM 2:21

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

Dear Mr. Jones:

I am concerned that a number of elders are refusing Waiver services because they are intimidated by the demands placed upon them by Estate Recovery. These elderly people only have their homes and are struggling to hold onto the only remaining property they have. They usually want to leave this to their children. Some are fearful their grown children, who live in these homes, will be forced to leave.

I do not think that the elderly people understand the impact that turning down Waiver will have upon their lives. Surely these people are at high risk for placement in nursing homes resulting in even higher costs for their care.

I would like to see Estate Recovery abolished for these already struggling families in need of Waiver Services.

Thank you for listening to these comments.

Sincerely,

Janine Fields

Janine Fields, MSW, LSW
Clinical Social Worker
Counseling for Caregivers

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
OFFICE OF LEGAL COUNSEL

ORIGINAL: 2043
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DATE: August 24, 1999

SUBJECT: Public Comments - #14-445

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

FROM: Ruth O'Brien RO'B.
Senior Assistant Counsel

Attached are public comments received August 23, 1999 on the MA Estate Recovery Regulations, #14-445.

Attachment

cc: Scott Johnson
Niles Schore
Sandy Bennett
Melanie Hauck

#26

14-445

COMMUNITY LEGAL SERVICES, INC.

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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 recovered 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

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
OFFICE OF LEGAL COUNSEL

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DATE: September 1, 1999

SUBJECT: Public Comment - #14-445

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

FROM: Ruth O'Brien R.O'B.
Senior Assistant Counsel

Attached is a public comment received August 31, 1999 on the MA Estate Recovery Regulations, #14-445.

Attachment

cc: Scott Johnson
Niles Schore
Sandy Bennett
Melanie Hauck

(28)

#14-445

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SOUTHWESTERN PENNSYLVANIA
PARTNERSHIP FOR AGING

Charles Jones , Acting Chief
PA DPW Third Party Liability Section
PO Box 8486, Harrisburg, PA 17105

FAXED CORRESPONDENCE
1-717-772-6598 August 23, 1999

Dear Mr. Jones,

On behalf of the 385 members of the Southwestern Pennsylvania Partnership for Aging (SWPPA), we would like to comment on DPW's proposed rules on estate recovery (55 PA. Code Chapter 258) in order to implement the requirements of the Omnibus Budget Reconciliation Act of 1993 and related state law.

Specifically, we have comments in the following areas:

- As a number of other states have done, *DPW should establish exclusions for homesteads valued below certain levels*. The specific level we would recommend is any homestead valued at less than $50,000. We are recommending this homestead exclusion out of the desire to encourage senior usage of the PDA Waiver Program, a program some seniors are reluctant to now utilize because of existing state recovery provisions.
- *DPW should extend the hardship waiver so that it is available for relatives other than the immediate family when certain conditions apply*: the other relative resides in the home, has acted as the caregiver for two or more years, and has an income that does not exceed 100% of the federal poverty guidelines. By including other relatives, such as grandchildren, nieces, nephews and foster children – increasingly common caregivers - in the hardship waiver, the role of extended family caregiving is rightfully acknowledged and respected.
- *The rules for hardship exclusions should be re-written to be less vague and more clear and specific*. Re-wording of this section could both aid in lessening the intimidation of this provision and make seniors feel more comfortable in requesting a hardship exclusion.

Thank you for the opportunity to comment on the proposed estate recovery rules. SWPPA looks forward to reviewing the feedback information DPW receives on the proposed rules.

Sincerely,

Carolyn Rizza
Carolyn Rizza, Ph.D.
President

Mary Anne Kelly
Mary Anne Kelly
Executive Director

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Pennsylvania Department of Community and Economic Development
Deputy Secretary

August 23, 1999

Charles Jones, Acting Chief
Third Party Liability Section
PA Department of Public Welfare
Harrisburg, PA 17105

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Dear Mr. Jones:

The PA Department of Community and Economic Development requests that your Department reconsider its proposed Medical Assistance Estate Recovery Program regulations. These regulations may impose a very deleterious effect on lower income communities. We request that you consider either establishing a threshold or a hardship exemption that would waive collection on primary residences valued less than $50,000.

We have received comments from housing advocates about the detrimental effect that the existing program has on low-income neighborhoods. They claim that this program has led to increase housing vacancy rates when family heirs refuse to sell these homes rather than repay Medicaid claims on their relative's home. Also, if they continue to live in those homes, they fall into substantial disrepair when they cannot obtain a loan to repair or rehabilitate the home because of lacking clear title. As more than one home falls into disrepair, low-income neighborhoods become blighted and they decline more rapidly.

Housing and community development advocates have proposed a reasonable alternative in excluding the first $50,000 of property value to minimize this property abandonment and neighborhood decline. Focusing on deceased Medicaid recipients with higher valued estates seems to be a more appropriate targeting of collection efforts.

If you have any questions about these comments, please contact Ed Geiger, Acting Director, DCED Office of Community Development and Housing.

Sincerely,

David E. Black
Deputy Secretary
Community Affairs
and Development

cc: Secretary Samuel A. McCullough
Peg Dierkers

(19)

#14-445

99 AUG 25 PM 4:35

Lynette M. Killen
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August 23, 1999

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

Re: 55 PA.CODE CH.258 – Proposed Rules on Estate Recovery:

Dear Mr. Jones:

I have reviewed the proposed rules for estate recovery. As the chair of the Long-Term Care Council's Work Group on Estate Recovery, I have intimately been involved with the estate recover program in Pennsylvania over the past year. My comments, however, are personal and do not officially reflect those of the Work Group or the Long-Term Care Council.

The Federal government has set minimum standards, which I believe Pennsylvania's current law met. However, there are some gray areas, which I believe the proposed rulemaking does not address clearly. First, hardship exclusions are not clear and specific. Although current staff seem to be fair in their application of the law, the vagueness of the law, coupled with the unpredictability of future staff actions, does not give assurances to MA recipients as to when they will be granted an exclusion. These rules need to be clear and specific. Consideration also needs to be extended to relatives, other than immediate family, when they have been providing caregiving for two or more years. This is a common practice in many ethnic and minority communities.

Additionally, the expanded definition of the scope of recovery to include not only a probated estate as well as property passing by intestacy. I do believe that the current definition does not need to be expanded to meet federal law, since many states, with no consequence, are more limited in their definition of recovery than Pennsylvania.

The new law also puts the Department's claim to wages, small bank accounts, certain life insurance accounts, and personal car accounts before the claim of family members. I have no problem with this practice, but do advocate for DPW establishing minimum value exclusion for some homesteads. This amount could be established through a cost-benefit analysis and socio-demographic research methods. A significant number of low-income elderly refuse MA services rather than lose their homes. This strong emotional attachment to their home and to their desire to pass it on to an heir may prevent the elderly from receiving the services they need for appropriate care.

Lastly, the expansion of the estate recovery program to include private attorneys in the role of estate administrator may produce more dollars for the program by decreasing expenses and increasing revenue, but may also unknowingly change the current philosophy and acceptable operating principles of DPW's estate recover staff. Without clearer guidelines regarding the role of the attorneys, I find it difficult to support this expansion in the program.

Please carefully consider my comments when finalizing the rules of the Department of Public Welfare's Estate recovery Program. Thank You.

Sincerely,
Lynette M. Killen

Lynette M. Killen
610.688-7836

(23)

COUNTY OF NORTHAMPTON #14-445

AUG 27 PM 2:19

JOHN R. MEHLER
Director

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August 23, 1999

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

Dear Mr. Jones:

Northampton County Area Agency on Aging appreciates the opportunity to comment on the Department of Public Welfare's proposed regulations on estate recovery. We reviewed these proposed rules from the perspective of those we serve (predominately lower to moderate income/asset consumers of community-based services), and have three (3) recommendations for DPW's consideration:

1. Establish an exception for homesteads valued at $50,000 or less to minimize estate recovery's impact on the refusal of services by MA long term care eligible consumers. We have found through our administration of the PDA Waiver in Northampton County, that a number of low income elderly refuse necessary MA services so as not to expose their homes to the MA recovery process. This is due not to the market value of the home, but rather to the sincere desire on the part of the older adult to have some sort of inheritance for their heirs. Because of their concern, some seniors cut themselves off from the only public resource available to help to meet their increasing functional needs, which is not good public policy, as the intent is definitely to help people stay at home, with safety and dignity. Still other older adults refuse Waiver services only to be

forced into more expensive nursing home care when their physical/cognitive needs excerbate. It would appear advantageous to waive recovery efforts on low-value homesteads to encourage utilization of cost-effective community-based care without attendant fear of the State.

2. To respond to the specific needs of minority community families, the hardship waiver should be available for relatives other than immediate family members when they have provided caregiving for two or more years. There are important family relationships that do not fall within the "immediate family" category such as grandchild, foster children, nieces, nephews, etc. Seniors often need a caregiver to stay with them to maintain their independence. Especially, in a minority community, this is as likely to be a grandchild as a child. In cases when the caregiver's income does not exceed (100% of the FPIG and the caregiver has provided care for two or more years an undue hardship waiver should be granted.

3. Rules for hardship exclusion need to be clarified so that, like in issue #1, older adults do not refuse services out of fear or confusion about when estate recovery does or does not apply.

The Pennsylvania Department of Public Welfare has our respect for taking a middle of the road approach to this controversial subject. We believe that these modifications, if enacted, will aid DPW even further in its' obvious efforts to be even-handed.

Thank you for your consideration of these comments.

Very truly yours,

John R. Mehler
Director

JRM:jem
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#14-445

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Post-it® Fax Note 7671	Date 8/24	# of pages ▸ 3
To Mr Charles Jones	From John F Bauer	
Co./Dept. DPW	Co. Del Co. AAA	
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JOHN F. BAUER
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Mr. Charles Jones, Acting Chief
Department of Public Welfare
Third Party Liability Section
P.O. Box 8486
Harrisburg, PA 17105

August 23, 1999

Dear Mr. Jones:

The Delaware County Office of Services for the Aging (COSA) is pleased to offer comments in response to the Department of Pubic Welfare's proposed rules on Estate Recovery (55 Pa. Code Ch. 258) released on July 24, 1999.

COSA has administered the Pennsylvania Department of Aging Medical Assistance Waiver Program since November 1996. Presently we are serving over 125 waiver consumers in Delaware County. We endorse the positive service options for which the Waiver provides such as being able to serve low income seniors through home and community based services with a service package individually designed to accommodate their specific needs versus being placed in a nursing care facility.

Keeping in mind the demonstrated positive aspects of the DPW Aging Waiver, we have also experienced unforeseen negative consequences such as the **estate recovery** rules. We offer three examples, which negatively impact our ability to provide necessary services to low income elderly in Delaware County.

1. Medicare does not pay for community based long term care services. The 1915 C Medicaid Waiver is the only public resource to assist low-income elderly to remain in their homes as their health status declines. Many of the homes owned by these elderly have such little

market value; one has to wonder if estate recovery by the Commonwealth is practical? The emotional attachment of one's home and the need to pass on a legacy to children or grandchildren often forces low income elderly, in serious need of assistance, to **refuse** the assistance rather than "give up" their home. Sometimes as a result of this refusal, this consumer one might eventually be seen in Adult Protective Services.

2. Mandatory waiver enrollment and the inclusion of estate recovery does not provide for equity across services for consumers. One policy states eligible consumers **must** be served in the Waiver program. If consumers choose not to participate in the Waiver (many decline only because of the estate recovery rules), then they are limited to $200 per month in service dollars. Since eligibility in the waiver program also means a low-income status, these consumers are subject to estate recovery. However, higher income seniors are not eligible for the waiver or subject to estate recovery, but they receive services through the aging services block grant. Is it equitable for low-income elderly residents of the Commonwealth are subjected to estate recovery when middle and upper income elderly are not? From the State's perspective is this good policy to take the poor elderly homes and not middle or upper income elderly?

3. We believe estate recovery may negatively impact on "marginal and low income" neighborhoods. Many heirs will abandon properties if they believe they will receive no benefit from selling. Or if a family member remains in the home, often times they may not be eligible for loans to do necessary maintenance if they do not actually own the home. It is our understanding, that most states only recover about 1% of the cost of their Medicaid expenditures. One must question the recovery effort weighed against the costs to consumers, their families and our communities.

We propose that the Department of Public Welfare reexamine the estate recovery rules altogether with a special emphasis on excluding homes valued at less than $50,000 to minimize the impact on property abandonment and the refusal for services by eligible MA long term care consumers. We propose the hardship waiver be reviewed to include relatives other than immediate family members who provide caregiving for a specified period of time.

We thank you for the opportunity to offer comments on the proposed rules. If you need further clarification or wish to discuss the impact of the estate recovery rules in Delaware County, I may be reached at 610-713-2141.

Sincerely yours.

John F. Bauer

John F. Bauer, Director
Delaware County Office of
Services for the Aging

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August 20, 1999

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

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

Dear Mr. Jones:

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

I. SECTION 258.3(F) IS NOT VALID

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

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

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

A state statute or regulation is invalid under the Supremacy Clause of the Constitution if (1) Congress states so in express terms; (2) the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation; or (3) where state law conflicts with federal law. California Federal S. & L. Assn. v. Guerra, 479 U.S. 272 (1987). When measured against either of the three standards, it is clear that federal law preempts §258.3(f).

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

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

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

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

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

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

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

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

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

B. Other Objections Regarding Section 258.3(f)

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

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

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

Second, the regulation provides no exception for transfers that are specifically permitted under federal Medicaid law. For example, spouses are permitted to make penalty-free transfers to each other. In fact, under 55 Pa.Code §178.125(b), DPW **requires** an institutionalized spouse to transfer certain assets to the community spouse in order to become eligible for Medicaid. Under the presumption created by §258.3(f), these spousal transfers would be deemed fraudulent. Even if they occurred more than 1 year prior to death, they would be subject to recovery under 258.3(f). Likewise, holiday and birthday gifts to family members and contributions to charity within 1 year of death would also be deemed fraudulent.

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

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

II. Conclusion

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

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

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

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

Very truly yours,

Robert Clofine

enclosures

cc: The Honorable Harold F. Mowery, Jr.
Senate Committee on Public Health and Welfare
Pennsylvania Senate
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
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Richard Sandusky
Independent Regulatory Review Commission
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Harrisburg, PA 17101

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Appendix 9-1

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State Medicaid Manual
Part 3–Eligibility

DEPARTMENT OF HEALTH AND HUMAN SERVICES
HEALTH CARE FINANCING ADMINISTRATION

TRANSMITTAL NO. 63—SEPTEMBER 1994

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

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

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

3810. MEDICAID ESTATE RECOVERIES

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

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

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

Permanently institutionalized individuals are persons of any age who are inpatients in a nursing facility, ICF/MR, or other medical institution as defined in 42 CFR 435.1009, and who must, as a condition of receiving services in the institution under your State plan, apply their income to the cost of care, as provided in 42 CFR 435.725, 42 CFR 435.733, 42 CFR 435.832, and 42 CFR 436.832. You must specify in your State plan the process by which you will determine that an institutionalized individual cannot reasonably be expected to be discharged from the medical institution and return home, the notice to be given the individual, the process by which the individual will be given the opportunity for a hearing, the hearing procedures, and by whom and on what basis the determination that the individual cannot reasonably be expected to be discharged from the institution will be made. States are not required to use the supplemental security income intent to return home rule for purposes of determining whether an individual is permanently institutionalized for purposes of estate recovery. This rule applies only to eligibility determinations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. *Notice.*

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

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

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

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

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

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

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August 20, 1999

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

Re: Proposed Regulations
Published July 24, 1999 in
The Pennsylvania Bulletin (29 PA B 3888)
Relating to 55 PA Code
Chapter 258 MA Estate Recovery Program

Dear Mr. Jones:

I was pleased that the Department is finally issuing proposed regulations regarding the Estate Recovery Program to bring some uniformity and certainty to the Program. However, two provisions cause considerable concern to me with respect to my practice and many elderly clients.

The first concerns Section 258.3(f) which states "For purposes of this Chapter, the Department will presume that any transfer of assets which a decedent made within one year of death for less than reasonably equivalent value is recoverable for the estate." On its face, this regulation would cause legitimate and allowed transfers by the Department to be brought in after someone's death. For instance, a mother who transfers her house to a disabled child in accordance with the regulations and dies within one year. I would suggest that the regulation read that any transfer of asset which a decedent made within one year of death for less than reasonably equivalent value and not reported to the Department during the decedent's lifetime is recoverable for the estate. I believe that addition would prevent the abuse and fraud that you perceive occurring and yet allow for the legitimate transfers.

The second concern regards Section 258.4(c) which states "The Department's Third Party Liability Section will date stamp all notices from personal representatives when received. The date stamp conclusively establishes the Department's receipt of the notice." If receipt is by personal service, certified mail or other evidence of actual receipt, that must be the date used. Once the Department receives the notice, it is beyond the sender's control to show when an employee actually stamps the receipt. Additionally, this regulation states "that the date on that statement of claim conclusively establishes the Department's submission date" regardless of any postmark date. The Department must be held accountable to the same degree as any other agency or person within this Commonwealth. This regulation as proposed would allow for any employee to cover a mistake by back dating a notice. What happens if the notice is accidentally placed in a desk drawer or file and forgotten. While I have not had this occur with the Third Party Liability Section, I have had the County Assistance Office send notices three weeks after they were written. The Department must apply the same standards to themselves as they do to the personal representative. Statements of Claim must be sent by the Department within the proper time, not just dated on the claim. If the Department fails in its duty, then it must face the consequences set forth in the law.

Respectfully submitted,

Dana M. Breslin

DMB:njm
cc: Lois Nafziger, Esquire
Chair of Pennsylvania Bar
Elder Law Committee
Andrew Coates, Esquire
Jean Graybill, Esquire

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PA Low Income Housing Coalition

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August 20, 1999

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

Dear Mr. Jones:

The Pennsylvania Low Income Housing Coalition (PALIHC), a statewide membership organization which advocates for safe, decent and affordable housing for all Pennsylvanians, would like to offer the following comments in response to the Department of Public Welfare's proposed rules regarding the Medical Assistance Estate Recovery Program (55 Pa. Code Ch. 258) released on July 24, 1999.

Many communities in the Commonwealth are struggling to survive depopulation, disinvestment and abandonment. These problems often correspond with low home values and high concentrations of elderly homeowners. Any public policy that discourages the sale and occupancy of homes by new residents will exacerbate the problems confronting such communities.

Unfortunately, the Commonwealth's estate recovery policy of placing liens on homes of all Medical Assistance recipients inadvertently encourages disinvestment and abandonment in communities where property values do not significantly exceed the amount of the lien. Deprived of economic incentives to probate wills, heirs abandon properties in such circumstances and the properties often become vandalized health hazards.

Almost every county in the Commonwealth has neighborhoods whose property values fall below the average MA nursing home cost in Pennsylvania. The boroughs, townships and municipalities in which these neighborhoods are located can not afford the loss of tax revenue resulting from increased abandonment and loss of population. The negligible increased revenue accruing to the Commonwealth through DPW's universal MA lien policy is insignificant compared to the additional burden that it places on neighborhoods and local governments.

Federal law affords states the option to establish exclusions as to what size estate will be subject to MA estate recovery. PALIHC recommends that DPW establish exclusions for homesteads valued at less than $50,000 to minimize estate recovery's unintended encouragement of property abandonment and disinvestment.

Thank you for the opportunity to provide these comments.

Sincerely,

Andrew Frishkoff
Executive Director

(4)

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Community of Caring

"Helping one another in a loving way"

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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:

The Community of Caring, a non-profit that deals closely with the homeless and those at risk of becoming homeless, strongly supports the proposal that the Department of Public Welfare should establish exclusions for at least the first $50,000 of property value to minimize estate recovery's impact on property abandonment and the refusal of services by Medicaid Waiver eligible consumers. Doing so may well prove to increase the net amount recovered by focusing efforts on higher valued estates of deceased Medicaid Recipients and thus reducing collection expenditures.

We urge you to take action in this matter to help save our neighborhoods, and protect the health and welfare of the state's senior citizens.

Sincerely,

Craig J. Heuser

Craig J. Heuser
Administrative Assistant

CJH:ck

"He hath shown thee... what is good, and what does the Lord require of thee but to do justly and to love mercy and walk humbly with thy God?"
—Micah 6:8

CENTER FOR ADVOCACY
CARIE
FOR THE RIGHTS AND INTERESTS OF THE ELDERLY

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

RE: Medical Assistance Estate Recovery Program – Proposed Rulemaking

Dear Mr. Jones:

On behalf of CARIE, the Center for Advocacy for the Rights and Interests of the Elderly, I thank you for the opportunity to comment on the proposed regulations for the Medical Assistance Estate Recovery Program. We offer the following comments to the regulations that were published in the Pennsylvania Bulletin on July 24, 1999.

We support the Department's position to "establish the minimum program required by Federal law." The primary focus of our remarks relate to 258.3 "Property liable to repay the Department" and 258.10 "Undue hardship waivers." CARIE has been providing advocacy services to frail older adults for more than twenty years. Many of our clients are homebound or institutionalized. Issues related to property and the ambiguity surrounding the undue hardship waivers has created confusion among older adults, their caregivers and the professionals who help them.

As a member of the Pennsylvania Intra-Governmental Council on Long Term Care and through our experience at CARIE, I am aware of and concerned about how Pennsylvania's estate recovery policies may be contributing to the abandonment of housing and ultimately, the deterioration of various communities. According to the Council's "Medicaid Estate Recovery Work Group Report:"

It is hypothesized that estate recovery may contribute to housing abandonment and vacancy when the value of the claim exceeds the value of the property. This may discourage the heirs from probating the will to allow a property to be turned over to a new owner. Rather, the house just sits there, continuing to deteriorate and blighting the neighborhood. Given the high cost of rehabilitation, it is in the interest of neighborhood residents and public officials alike to ensure that ownership and maintenance responsibilities are transferred as quickly as possible.

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A United Way Agency

A proposed solution is to identify the property value at which estate recovery is not cost-effective, either in terms of administration or its impact on the neighborhood, and exempt those properties that fall below that value.

CARIE supports either the initiation of such a formula or a basic determination that properties that fall below a specific dollar value (e.g. $50,000) will be exempt. If the formula option is pursued, a determination should be made before Medicaid services are rendered. A clearer policy in this area can also help address the problem of older adults who refuse needed care because of the fear of loss of property through estate recovery.

The Health Care Financing Administration (HCFA) even suggests that states give special consideration to estate recovery hardship cases and has provided examples to help states establish criteria. Homesteads of modest value are included among HCFA's examples. For example, Kentucky excludes homesteads valued at as much as $50,500 from estate recovery.

Section 258.7(c) states that items of personal property which exceed $10,000 fair market value are recoverable assets. A decedent could have a car, some jewelry and many other items that add up to $10,000, even though each item may be worth very little. The personal representative would have the burden of protecting assets that have very little individual worth. The Department should consider providing exceptions to this rule when the majority of items on the list are individually worth very little.

While 258.10 fills a void in current State statutory language, it still leaves some ambiguities and areas of concern. While we support the concept of 258.10(e), giving the Department discretion to evaluate hardship on a case-by-case basis, we hope that further expansion and detail can be provided in 258.10. Having clear definitions of "undue hardship" can reduce the confusion that has surrounded estate recovery since it began in 1994. If no change is made to more clearly define the exemptions, older adults will continue to refuse needed care.

Older adults are cared for by all kinds of relatives. It is troublesome to see that the definition of when the Department may waive its claim includes only "immediate family." There are daughters-in-law, grandchildren, foster children, step children, nieces, and others who are providing extensive care to older adults that is ultimately preventing institutionalization. All caregivers, despite their relationship should be included in 258.10(b) and 258.10(d). The term "caregiver" should replace "immediate family member" in this section and the term "caregiver" should be broadly defined in 258.2.

We would also like to recommend that 258.10(b)(1) be expanded to include Medicaid home and community-based care. Whenever possible, policies should be implemented that are supportive of home and community-based care and help deter nursing home placement.

Section 258.10(b)(3) should be expanded to give special consideration to households with high medical expenses or caregivers that have left work to care for an ailing loved one. Once again, having policies that encourage care to be provided in the home should be supported. The more individuals are diverted or delayed from nursing home placement will ultimately save the Commonwealth money.

We need to stress that, although it is evident that much of the property owned by low income elderly will never be subject to estate recovery, those seemingly valueless properties mean a great deal to the vulnerable older adults whom we serve every day. Now, even though it is unlikely their estate will be recovered, older adults cannot be advised of this and some have refused much needed services to hold onto a property that would be useless to anyone else.

Founded in 1977, CARIE is a non-profit organization dedicated to improving the quality of life for frail older adults. CARIE's focus of concern spans the continuum of long-term care needs from those who are homebound to those who are institutionalized. Older adults who experience physical frailty or psychological impairment frequently have difficulty advocating for themselves and are often a silent group. CARIE works to protect their rights and promote awareness of their special needs and concerns.

If you need any further clarification regarding these comments, please do not hesitate to contact me at (215) 545-5728, extension 244 or at menio@libertynet.org.

Sincerely,

Diane A Menio

Diane A. Menio
Executive Director

My rainbow . token of the covenant between Me and you...for perpetual generations

Philadelphia Geriatric Center

EXECUTIVE OFFICES Suite 427 • The Pavilion • 261 Old York Road • P.O. Box 728 • Jenkintown, PA 19046-7128
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August 19, 1999

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

Dear Mr. Jones:

I am writing to offer comments to the recently proposed DPW rules on estate recovery. Although the establishment of the Waiver Program in Pennsylvania has been a great benefit to many of the state's most disabled and poorest elderly, the Medical Assistance Estate Recovery Program regulations have prevented many from accepting services for which they qualify.

Through our Counseling for Caregivers program, we come into contact with hundreds of caregiving families each year. Typically they are caring for elderly relatives who require round-the-clock care. Due to the efforts of their families, these seniors are being cared for in the community rather than in nursing homes. These caregivers are often elderly spouses who are frail themselves and are at great risk of decline in their own physical and mental health. Other times they are adult children who have given up jobs and sometimes their own homes to be full-time caregivers. They are committed to keeping their elders out of nursing homes for as long as their own strength permits. In order to extend the duration of their caregiving, some of these families need the assistance of publicly funded aging services.

Unfortunately, some caregivers turn down the PDA Waiver program, the only source of community-based services for them, due to the Medical Assistance Estate Recovery Program. Spousal caregivers fear losing their house; adult children, whose only home is with the elder, fear becoming homeless. At times it is the impaired elder himself who makes the decision to refuse Waiver services.

For most of Waiver-eligible people, their house is their only asset. The house may have been a family homestead for generations. Their strong emotional attachment to their home and/or their desire to pass on their home to their children can become the single factor upon which the decision to accept Waiver services is based.

Unfortunately, many of the people who turn down Waiver services due to estate recovery provisions do so out of a lack of adequate understanding of the actual rules. Written information about the program is vague and frightening. People often interpret the regulations to mean that a lien will be placed on their property. Most of the people who are scared off can not be easily reassured that their understanding is incorrect. Lawyers may have the most clout with these seniors. However, it is very difficult for people to gain access to free or low-cost legal counsel to explain the potential impact of estate recovery on their individual situation.

We feel that Pennsylvania should make the following changes to its Estate Recovery Program as a way to encourage families' efforts to care for their frail elders at home in the community. The longer elders can be kept out of nursing homes, the fewer Medical Assistance dollars are spent on their care.

We recommend that:

1. Homes valued at less than $50,000 should be excluded from estate recovery as a way to reduce refusal of services by eligible PDA Waiver consumers.

2. The hardship waiver should be extended to include relatives other than immediate family members where they provided care to the elder for two years or more. In some ethnic groups it is not uncommon for extended family members to assume caregiving responsibility.

3. Tighten up the rules for hardship exclusions so that it is clear from the start how a recipient may be affected by estate recovery.

4. If Pennsylvania should decide in the future to broaden estate recovery, new regulations should apply only to recipients who receive Medical Assistance long-term care benefits after the change were to take place.

Consumers should have easy access to complete information about the actual impact of estate recovery on their lives. Regardless of the final decision DPW makes about the Estate Recovery Program, it is essential to publish literature about its regulations that is both specific and easy to understand. Staff of area agencies on aging as well as other agencies likely to work with the frail elderly should be adequately trained to explain the regulations to people most likely to be affected by the program.

Thank you for considering our recommendations.

Sincerely,

Peninah C. Berdugo

Peninah C. Berdugo, MSW, LSW
Program Coordinator
Counseling for Caregivers

PCB/dmb

PCCA
Philadelphia Council for Community Advancement
100 North 17th Street
Suite 700
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LaVerne M. Jones
Executive Director

(7)

#14-445

August 19, 1999

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

Dear Mr. Jones:

The Philadelphia Council for Community Advancement (PCCA) supports strategies that reduce further any incidences of foreclosures, property abandonment and vandalism in low to moderate income neighborhoods in the Commonwealth of Pennsylvania. **Your consideration to revise the proposed rulemaking (55 PA.CODE CH.258) of the Estate Recovery Program to exclude properties with values less then $60,000.00 is urged.**

Philadelphia Council for Community Advancement (PCCA) has been providing foreclosure prevention counseling since the mid 1970's and has been effective in reducing the incidences of property abandonment, vandalism and deed in-lieu's of foreclosures in urban neighborhoods. Our efforts focus on maintaining stable communities that can attract and retain economic viability through public private investments.

The Estate Recovery as currently envisioned will have negative implications due to the value of the homes, particularly when the values are below $60,000. The inability of heirs to acquire, to repair or to sell the property after someone's demise can cause abandonment that leads to vandalism, thus effecting the overall stability of the neighborhood undermining the invested economic and housing initiatives that have occurred with federal, state and city partnerships.

We urge you to further consider and be responsive to the effects that the current proposed rulemaking will have on many communities throughout the Commonwealth to implement safeguards that protect families and neighborhoods from the negative impact of the Estate Recovery Program.

Sincerely,

LaVerne M. Jones

LaVerne M. Jones

A United Way Agency

EQUAL HOUSING OPPORTUNITY

(11)

#14-445

Housing Authority of the County of Chester

30 West Barnard Street, 1ST Floor • West Chester, PA 19382

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

Re: Estate Recovery Program

Dear Mr. Jones:

The Department of Public Welfare should establish exclusions for at least the first $50,000 of property value to minimize the estate recovery's impact on property abandonment and for the refusal of services by Medicaid Waiver eligible customers. Doing so may well prove to increase the net amount recovered by focusing efforts on higher valued estates of deceased Medicaid Recipients and thus reduce collection expenditures.

Your attention is needed on this urgent matter to help save our neighborhoods and protect the health and welfare of the state's senior citizens.

Sincerely,

Phyllis J. Stively

Phyllis J. Stively,
Director of Development

PJS/vh

Tel: (610) 436-9200 • Fax: (610) 436-9203

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August 19, 1999

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

Re: Proposed Regulations Re Medical Assistance Estate Recovery Program

Dear Mr. Jones:

I write concerning the proposed regulations published on July 24, 1999, in the Pennsylvania Bulletin, Volume 29, at page 3888. These regulations would be added to Title 55, Public Welfare, of the Pennsylvania Code.

Proposed Section 258.11 provides various alternatives for "unadministered estates". Subsection (d) authorizes the Department (i) to periodically develop and make available to any attorney or other person lists of unadministered estates which may have assets, so that an attorney or member of the public would seek appointment as administrator, and (b) to refer unadministered estates to local private counsel to administer the estate.

I am familiar with one such situation. An elderly lady died in 1997, leaving no spouse or issue, and a niece of hers received from the Third Party Liability Program in your Bureau of Financial Operations a claim of over $100,000 for medical assistance granted beginning around 1994. The only asset of the woman's estate was a checking account with a balance of about $1,100.

I suspect that there are many such estates and many such claims that have not resulted in any restitution.

I would urge the Department to use appropriate means to choose attorneys throughout the state, probably on a regional basis, who would qualify as personal representative and perform the necessary legal services with respect to unadministered estates of relatively small amounts.

These attorneys may generally be relatively inexperienced, since I believe that unusual legal principles will rarely arise, and the attorneys will quickly develop expertise in the administration of this type of estate.

Alternatively, an attorney with a competent paralegal might also be chosen for this network, with the paralegal spending most of the time necessary.

Such a program would, I believe, provide a net return to the Commonwealth in excess of what it is now receiving under the Program.

I believe that such an approach would be authorized by proposed Section 258.11, but you might want to review that section to see whether it does so.

Sincerely,

Donald R Waisel

Donald R. Waisel

DRW/jer

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
OFFICE OF LEGAL COUNSEL

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99 AUG 23 PM 2:02

DATE: August 23, 1999

SUBJECT: Public Comment - #14-445

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

FROM: Ruth O'Brien ROB
Senior Assistant Counsel

Attached is a public comment received August 20, 1999 on the MA Estate Recovery Regulations, #14-445.

Attachment

cc: Scott Johnson
Niles Schore
Sandy Bennett
Melanie Hauck

DANIEL R. FREDLAND

ATTORNEY-AT-LAW

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#14-445

99 AUG 24 AM 11: 28

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

August 19, 1999

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

Re: Proposed Rule Making, DPW, 55 PA. Code Chapter 258 (29 Pa.B. 3888)

Dear Mr. Jones:

I am writing to object to one subsection of the proposed rule making designated in the caption of this letter, specifically Section 258.3 (d). The objectionable part is the sentence, "Assets designated for a testamentary trust are subject to the Department's claim."

It is common practice for parents with a children suffering from a serious disability to designate a special needs trust to receive assets which they otherwise would divise or bequeath directly to the child. For many persons, a substantial percentage of the assets passing on account of their death consist of retirement plans or life insurance which passes outside the estate. Individuals who have a disable child whom they wish to benefit are advised to make the trustees of the special needs trust the beneficiaries on behalf of such a child.

For efficiency and to save paperwork, the special needs trust in question is usually set forth as a section of the will. The beneficiary of the life insurance policies and retirement plans are then designated in language such as the following: "Trustees of the special needs trust for benefit of my child, 'X', established under my Last and Will in Testament."

The intentions of this arrangement are (1) to establish a special needs trust which would have to be written out in only document, namely a Will, but which could receive both Testamentary and Non-Testamentary assets; (2) to be sure that even if the estate should prove to insolvent, at least life insurance and retirement plans assets would go in to the trust for the disabled child. That is, the testamentary trust, is treated as an entity separate and apart from the estate, in the sense that "estate property" is defined under the proposed regulations. Testamentary trusts are generally construed, in other contexts, as separate entities from the probate estate. The one sentence referred to above in Section 258.3 (d) undermines this distinction. It should be deleted before the regulations are made final.

This change will help middle class families to benefit a handicapped child. It will allow them to do so without undue complexity and expense in making an estate plan.

For all of these reasons, I respectfully suggest that the last sentence of the proposed regulation at 55 PA. Code Section 258.3 (d) be deleted from the final regulations.

Sincerely,

Daniel R. Fredland, Esquire

DRF/emp

cc: **<u>FIRST CLASS MAIL</u>**
Hon. Thomas Gannon
House Box 202020
Main Capital Building
Harrisburg, PA 17120

<u>FAXED</u>
NAMI, Pennsylvania
Attn: Mary Ellen Rehrman

<u>FIRST CLASS MAIL</u>
Mr. Robert Cofine, Esquire
One West Marketway
York, PA 17401

LIBERTY RESOURCES

Advocating and Promoting Independent Living for Persons with Disabilities

(8)

#14-445

August 17, 1999

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

Dear Acting Chief Jones:

I strongly urge that the Department of Public Welfare establish exclusions for senior citizens who own homes valued at $50,000 or less and are Medicaid recipients. Our senior citizens should not have to loose their homes. Nor should they be forced to turn down needed services like PAS (Personal Assistance Services) for fear of losing their homes. Families are being destroyed through the "estate recovery process."

It is the right of every citizen to live and thrive in the community in their own homes. They have worked hard for many years to obtain and maintain their homes and families. Their homes that have little market value mean ***everything*** to them. They have earned the right to keep them and receive needed in-home services.

Please amend this "estate recovery process" to make this happen.
Thank you.

Sincerely,

Deborah R Russell

Deborah Russell
Assistant Manager Training & Support
Grassroots Advocacy Project

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LIBERTY
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2043

Elder Law Firm of Marshall & Associates

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August 18, 1999

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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).

<u>Specific Problems with Section 258.3(f) and Recommendations</u>: **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

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 1

Health care

Elderly face lien threat on homes

State will try to recover some 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

RECEIVED MAR 16 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

"Caring for You . . . . Your Family . . . . Your Community!"

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

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