

PENNSYLVANIA BAR ASSOCIATION

ELDER LAW SECTION

RECOMMENDATION

That the Pennsylvania Bar Association formally adopt the following resolution:

The Pennsylvania Bar Association is concerned with efforts to expand estate recovery, including Section 1412 of House Bill 1351 of 2009 (Printer's Number 1666), introduced on April 28, 2009. Such proposed legislation would enlarge estate recovery beyond the probate estate of a Medicaid recipient. It would allow Pennsylvania's Department of Public Welfare to impose administrative liens against interests created by joint tenancy, tenancy by the entirety, tenancy in common, survivorship, life estate, living trust or other arrangements. Such legislation is likely to create significant complications for estate administration, and will adversely affect ownership and transfer of both real and personal property. Such legislation seeks to impose obligations and administrative penalties that will deter individuals from serving as executors and trustees and lawyers from representing these fiduciaries. The safety of Older Pennsylvanians will be compromised when they refrain from seeking needed long-term support services because of fear of such new liens asserted by the Commonwealth. The PBA takes the position that Pennsylvania's Medical Assistance Estate Recovery Program be limited to claims against the Medicaid recipient's probate estate.

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REPORT

Pursuant to the Omnibus Budget Reconciliation Act of 1993 (“OBRA ‘93”), States implemented Estate Recovery Programs in an effort to offset, where appropriate, portions of the long term care expenditures of the Medicaid program. Pennsylvania implemented its Medical Assistance Estate Recovery Program in 1994 (“MAER”). The MAER authorized the Department of Public Welfare (“DPW”) to attempt to recover remaining assets from a decedent’s probate estate who received Medical Assistance benefits during her lifetime. Since its inception, the MAER claim has been limited to the decedent’s probate estate.

Medical Assistance (“MA”) programs for the elderly and disabled provide needed medical and social services to those who could not otherwise afford the necessary care to meet their needs and avoid life threatening situations. The financial eligibility guidelines for these programs are strict and generally limit the MA recipient to retain \$2,400 in countable resources in order to qualify for MA covered services in skilled nursing facilities and through home and community based services. Many MA consumers are already forced to spend down their life savings in order to access these programs but may retain modest exempt resources. House Bill 1351, introduced on April 28, 2009, attempts to further impoverish MA recipients and their families through expansion of the MAER claim to include non-probate property, which in most cases, endangers the family homestead.

There are a multitude of legal and equitable interests in various types of property held by a decedent at death. Many of these interests are difficult to quantify. The expansion of Estate Recovery seeks to attach some speculative interest in such property which would be ambiguous to the average consumer (and innocent third parties) who may not even be aware of the ownership of such interest and the consequences of receiving MA benefits as it relates to a possible future claim against such interest.

Currently, a majority of the States maintain an Estate Recovery Program which is limited to the probate estate. In addition, significant litigation has ensued in other jurisdictions where Estate Recovery has been expanded and Massachusetts recently repealed its expanded Estate Recovery Program because of challenges. While each state may tailor its Medicaid program within the parameters set by federal law, special consideration is due in Pennsylvania where we have a large elderly population who need to access MA programs to maintain their health, safety and welfare, and where we need to maintain incentives for younger family members to stay in the Commonwealth.

HB 1351 Aggravates Hardship to MA recipients and their families

Given the low countable resource allowance for MA programs, the most valuable asset retained by the MA recipient is usually the exempt homestead. Upon death, this home is sometimes still owned by the MA recipient and under current law becomes subject to probate and the MAER claim. The MA recipient’s family members are often devastated by the news of the Commonwealth’s claim; they had invested significant time and money into the maintenance and improvement of the home during the MA recipient’s lifetime and are forced to take legal action after the MA recipient’s death to “prove” their equitable interests to DPW in a hardship waiver process that is often subjective. To expand MAER beyond the probate estate, to reach family homesteads without regard to the form or duration of co-ownership, adds insult to injury for the families of MA recipients.

The expansion of MAER would also increase the likelihood that family members of a MA recipient would choose *not* to maintain the home of the MA recipient, thus allowing the home to deteriorate or be sold for delinquent taxes or mortgage debt, leaving nothing for MAER to recover and further contributing to the current housing crisis. **At least under the current MAER, the state has some recovery of MA expenditures when a family member chooses to maintain the value of the home or even better, purchases an interest in the home during the MA recipient’s lifetime and such funds can be used to supplement the needs of the MA recipient or prepay the MAER claim, with the expectation that the family member may receive some portion of the home upon the death of the MA recipient.** Simply stated, the expansion of MAER provides a disincentive for families to maintain the homestead of a MA consumer, which increases hardship and reduces the value of assets that could be claimed under the current MAER law.

Expansion of MAER is Cost Prohibitive

Under existing law, the parameters for determining the value of the probate estate are reasonably certain. The assets held in the probate estate present clear targets for claims by DPW, with relatively few opportunities for ambiguity about value. However, if MAER is expanded to interests held by the MA recipient at death, interests that are not traditionally subject to probate and court oversight, the costs of administration of recovery will rise dramatically. Under expanded MAER, DPW will need to employ significant additional resources, not only to identify the non-probate interests held by the decedent at death, but also the identity of the joint owner, beneficiary or other party who held an interest with the decedent at the time of death. Therefore, DPW will spend considerable resources investigating these interests, many of which will lead to little or no recovery. Further, because of the lack of education regarding MAER among the general public and their justifiable reliance on their ownership interests, there would be a considerable increase in hardship waiver requests, further increasing the administrative burden on DPW for enforcement.

Expansion of MAER burdens related third parties

HB 1351 lacks clarity about the scope of its expansion, but it would appear to impact a host of third parties. Many people own interests in assets such as life insurance, joint bank accounts, and trust accounts. It is unreasonable to expect the providers of such services, such as banks, life insurance companies and trust companies, to adhere to the intent of HB 1351 without imposing burdensome new procedures on releasing assets upon the death of a MA recipient. The proposed expansion of MAER to non-probate assets would require insurance companies to first check with DPW prior to paying a claim for fear of defending against litigation involving the decedent. Joint bank account or accounts titled as "payable on death" to a third party normally do not require a formal probate proceeding. The proposed expansion of MAER, however, would require all banks to first inquire with DPW as to the existence of a claim prior to releasing funds to a third party with a contractual right to such funds. While banks and insurance companies are just a few examples, the volume of such administration alone would cause havoc among these industries.

Section 1412 of HB 1351 Violates Due Process

HB1351 attempts to give DPW sole authority to determine liability of a person, such as a co-tenant, remainderman, or trustee, to pay the Department's claim. In seeking to recover from non-probate estates, DPW stands in the shoes of a creditor. To permit any creditor to have the sole authority over determination of priority and enforcement of its claims, without a statutory mandate for a fair system of hearings and appeals by a disinterested entity such as the courts, is a violation of fundamental notions of due process.

The Commonwealth's policy is to assist elderly and disabled individuals through the MA program in a cost effective manner. While financial constraints may guide decisions regarding publicly funded programs, the expansion of MAER to include non-probate assets would be counterproductive to enrollment in these programs and cost prohibitive to enforce. The proposed legislation would have far-reaching effects in numerous areas of law such as real estate and title matters, creditors' rights, fiduciary obligations in estate and trust administrations, insurance law and banking laws. Therefore, any consideration to expand MAER should be carefully considered in light of these collateral effects.

Respectfully Submitted,
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