CTNAELA
The Connecticut Chapter of the National Academy of Elder Law Attorneys

PRACTICE UPDATE

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President's Message

by Attorney Jack Reardon

As the saying goes, "a whole is only as good as the sum of its parts." As an organization, CT NAELA is very fortunate. We have many committed members contributing to the mission and success of our chapter. We are lucky to count so many esteemed, experienced and collegial elder law attorneys among our membership who volunteer their time to the mission of our chapter. Our national association's vision *"is to be the recognized leader inspiring and empowering attorneys to enhance the quality of life for the elderly and those with special needs."* Those who belong to NAELA know that these words are more than just an aspiration. We are lucky to experience the realization of this mission first hand.

We see our dues funding vital litigation efforts that protect the elderly and those with special needs. Our funding of the recent success in *Lopes v. Starkowski* is a prime example.

Our members also play an active role in lobbying efforts to protect and improve the lives of the elderly. Our members frequently meet with legislators and testify before committees of the General Assembly on proposed laws that affect the elderly. We are already continuing these lobbying efforts this year in support of raising the minimum CSPA, so that a community spouse can sustain the financial burden of living independently in her or his own home. We are also opposing efforts by DSS to improperly count as income a portion of the VA Aid and Attendance benefit for low income veterans and their surviving spouses.

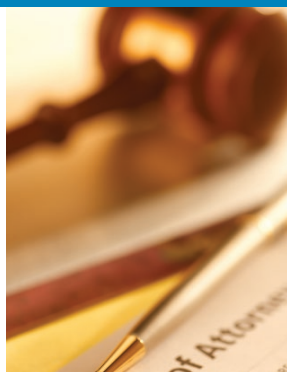
Our members also volunteer many hours to develop educational seminars on current topics in the field of elder law. This fall we are presenting the program, *Practice Points in Elder Law*, on October 31, 2014. This program will offer insight into five topics covering: (1) Applying Bezzini to all Non-Testamentary Transfers – A New DSS Policy? – including Practical Will drafting and beneficiary designation options; (2) Divorce in a Medicaid Situation; (3) Nursing Home Admission Agreements; (4) Avoiding Traps for the Unwary in Processing Medicaid Applications; and (5) Irrevocable Trusts for Medicaid Planning. (Details and registration forms are available on our website www.CTNAELA.org. As a membership benefit, our members pay discounted fees to attend our informative state and national seminars.)

Our members also contribute insightful articles to this *Practice Update*, published semiannually, which I hope you will find full of instructive articles written by experienced elder law attorneys.

NAELA also strives to assist attorneys in practice development. Our website (maintained by our members) www.CTNAELA.org and the national website www.NAELA.org both provide potential clients with a searchable listing of members by geographical location. Furthermore, the national website partners with CARELIKE,

(continued on page 3)

FEATURES IN THIS ISSUE:



The Languishing Fair Hearing Decision:
A Case for Injunctive Relief in Federal Court

by Attorney Brendan F. Daly

I. Introduction

My client had reached the end of her rope. Eight months had passed since we submitted an application for the Medicaid Home Care Program, and our calls to the Department of Social Services ("DSS") caseworker went unanswered. We submitted a fair hearing request based on the DSS failure to process the application in a timely manner, but two months later we had yet to have a hearing scheduled. It was then that I began thinking of pursuing injunctive relief in federal court. Perhaps this is a new age of optimism in hopes for quicker processing times, given the pending Stipulation in *Shafer v. Bremby*, (3:12-cv-00039, District of Connecticut, 2014), but what if you have a pending Home Care case, and your client's family members are paying out of pocket while awaiting the grant? This is the most severe type of hardship.

A Medicaid applicant with a pending Home Care application may request a fair hearing if DSS fails to process the application within forty-five days. (*See* UPM § 1505.35 C.1.c and 42 C.F.R. §435.911(a)(2)). But this is where the requested remedy can come to a halt. Although DSS must schedule a fair hearing within thirty days of the requested date (*See* UPM § 1570.25 B.1.b), this deadline is never met. Additionally, the fair hearing officer must issue a decision within sixty days of the hearing date, (UPM § 1570.25 J.1.c), although this deadline, too, regularly passes without the issuance of a decision.

Although there is an unpublished Connecticut District Court decision holding that the then Connecticut Medicaid agency was required to take final administrative action within ninety days from the date of the request for the fair hearing (*Labbe v. Norton,* D. Conn. 1974), the Second Circuit weighed in on the issue, clarifying that final administrative action means the State must issue a decision no later than ninety days from the date of the hearing request. *See Shakhnes v. Berlin*, 2012 U.S. App. LEXIS 16912 (2d Cir. Aug. 13, 2012). Now that there is precedent from the Second Circuit (binding on Connecticut) regarding the time frame to render a fair hearing decision, DSS must comport, and failure to do so would provide the basis for injunctive relief.

II. Jurisdiction for Injunctive Relief in Federal Court

A claim for injunctive relief in federal court is made pursuant to 42 U.S.C § 1983, which provides for redress when a State infringes on an individual's rights protected under the Constitution or a federal statute. Specifically, a Medicaid applicant or beneficiary has a cause of action in federal court against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State …causes…the deprivation of any rights, privileges, or immunities secured by the Constitution and laws…." *Id*. Although Congress enacted *1983* to provide an enforcement mechanism when States deprived individuals of equal protection under the Fourteenth Amendment, Medicaid applicants and beneficiaries have an enforceable individual right to medical assistance. (*See* 42 U.S.C. § 1396-a(a)(10), and *Maine v. Thiboutot*, 448 U.S. 1 (1980)). A 1983 claim, therefore, is rooted in the doctrine of conflict preemption—that a State participating in the Medicaid program may not promulgate a statute or regulation in contravention of federal law pursuant to the Supremacy Clause. (*See* U.S. CONST. art. VI, cl. 2). Although the Supremacy Clause provides for preemption when State laws conflict, it does not confer an individual right that an individual may enforce; hence the necessity of *1983* actions.

Since a violation that occurs pursuant to *1983* must come at the hands of a State official ("every person who…."), a claim is made against the DSS Commissioner, not the State of Connecticut. (Additionally, the Eleventh Amendment of the U.S. Constitution provides States with immunity from lawsuits.) A plaintiff must cite a violation of a personal federal right—not just a violation of law—to make a valid 1983 claim. In other words, a Medicaid applicant must have an individual right afforded protection under a federal statute. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284-285 (2002). The motion for injunctive relief must also allege irreparable injury—certainly the lack of retroactive relief for home care is a basis for irreparably injury. Additionally, lack of retroactive relief in federal court, pursuant to the Eleventh Amendment, is also cause for irreparable injury. (See *James v. Richman,* 2006 U.S. Dist. LEXIS 28384 (M.D. Pa. 2006)).

III. Making the Claim under Shakhnes

In *Shakhnes*, the plaintiff's *1983* right was an opportunity to a fair hearing under 42 U.S.C. § 1396a(a)(3). However, this statute is silent as to the requirement to issue a decision or time frame to do so. Instead, the requirement to issue a decision within a specified time frame is in regulation form under 42 C.F.R. § 431.244(f)(1)(ii), which provides that, with respect to fair hearings, "…a State agency 'must take final administrative action… [o]rdinarily within 90 days' of the date the fair hearing is requested." *Shakhnes*, at 8. The regulation elaborates on the federal right by filling in two missing components for enforcement: the reference to a decision and a time frame for final administrative action.

Shakhnes involved an appeal of the New York Federal District Court decision granting injunctive relief for New York's failure to take final administrative action in a timely manner. The issues on appeal were: (1) whether the opportunity to a fair hearing is an enforceable right giving rise to a *1983* cause of action; and if so, (2) whether the 90-day requirement for final administrative action is an enforceable "temporal element" of the statutory right to the hearing by requiring a decision within this time frame. *Id*.

A. The Opportunity to a Fair Hearing is an Enforceable Right

The State argued on appeal that a regulation (42 C.F.R. § 431.244(f)(1)(ii), which sets the 90-day deadline for the fair hear-

ing officer to issue a decision) may not create a *1983* right. While true, this is not what the District Court concluded. The Federal District Court concluded that the opportunity to a fair hearing under 42 U.S.C. § 1396a(a)(3) is an enforceable right and since this *right* is provided for in a federal statute, it gives rise to a cause of action under § 1983. *Id*. (citing *Shakhnes v. Eggleston*, 740 F. Supp. 2d 602. 615-616 (S.D.N.Y. 2010) Since the individual right is delineated in a federal statute, the Court affirmed the lower court's ruling and held there is a valid *1983* cause of action. *Id*, at 10-13.

B. An Agency Regulation May Further Define the Statutory Right to Include the Decision and Time Limit

Although the federal statute provides for the individual *right* to a fair hearing, there is no statutory reference to the requirement of a decision or the time frame to issue one. But provided a statute "confers a specific right upon the plaintiff," an agency regulation may further define or "flesh out the content of that right." *Id* at 10. Consequently, the federal right to a fair hearing can be further defined by the agency regulation to include a fair hearing decision issued within a specified time.

The regulation at issue is 42 C.F.R. § 431.244(f)(1)(ii), which requires that the agency "take final administration action" no later than 90 days from the date of the request. The Court concluded that this means the fair hearing officer must issue a decision since the right to a hearing is meaningless without a decision. *Id*. And the Court held that the absence of the requirement for a decision—along with a deadline by which the fair hearing officer must issue one—runs afoul of due process standards for administrative proceedings set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970). Since *Goldberg* held that the due process right to a hearing includes a right to "an impartial decision maker," the Court concluded that it "…see[s] little reason why this would be so unless the right to a fair hearing includes the right to a decision." *Shakhnes*, at 13. As such, the Court held that "final administrative action" means the requirement to issue a decision. *Id*.

Lastly, the Court overruled the District Court injunction ordering that the State implement the relief ordered in the fair hearing decision within 90 days of the date of the hearing request. *Id*, at 14. The Court held that the requirement that a State take "final administrative" action within the 90-day deadline pursuant to 42 C.F.R. § 431.244(f)(1)(ii), means that the fair hearing officer issue the decision—not that the State must carry out the effect of the decision within this time frame.

IV. Conclusion

It all ended well with my client: DSS approved the application a few weeks later without ever scheduling the fair hearing. But if you are waiting months for the State to schedule—or issue a decision on—a fair hearing, consider the *Shakhnes* case and injunctive relief. And, since the plaintiff is entitled to legal fees if the prevailing party in a *1983* case, your client will not incur additional fees. This would not be the case if the State issued the decision before the hearing (since the case is mooted out in such a scenario), but it would have been your advocacy that prompted the State to take final administration, and clearly such efforts are valuable indeed. ■

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SEEKING WEB SITE COMMITTEE MEMBERS

Would you consider joining the Web Site Committee? We want our Connecticut Chapter to have one of the best elder law web sites in the nation. Check out the site at www.ct-naela.org. We seek CT-NAELA members who are willing to share ideas and innovative approaches that will make our site a daily resource for Connecticut elder law attorneys. You don't have to be a Steve Jobs or have a degree in computer science. You just have to know what elder law attorneys find useful.

We meet by teleconference for 30 minutes a month and work on assignments generated at the meeting during the month. We have a paralegal helping with updating the site. Consequently, it is not a huge time commitment. Just give me, Jack Reardon, a call at (860) 442-0150 or send me an e-mail at jjr@261law.com. It's a great way to participate in our Chapter and you may learn a bit of elder law along the way. We would love to have you.

The CT-NAELA Web Site Committee

President's Message

(continued from page 1)

a caregiver resource finder that includes a listing of our members among the Elder Law Attorney category. I can attest that I have received many referrals from out-of-state NAELA members who have clients seeking assistance in Connecticut and who found me through the website directory.

Both NAELA websites also provide useful forms, brochures and information for new and experienced practitioners. Members also enjoy access to a nationwide listserv where elder law practitioners throughout the country share client problems and brainstorm over practical solutions that work in their jurisdictions.

All of the above benefits are made possible by our committed members. One of my main objectives this year as President is to expand the reach of our state chapter by growing the membership. If you are not a member of CT NAELA, I urge you to join and experience the above benefits for yourself. For those members reading this, I encourage you to reach out to your colleagues and invite them to join CT NAELA. The continued success of our chapter depends upon the active participation of you, our members. If you are interested in joining, please contact me at jjr@261law.com. ■

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PRACTITIONERS CORNER:

A Comparison of Case Management Systems

by Attorney Paul T. Czepiga

This article assumes that you are familiar generally with a case management system. If you don't have one as part of your day-to-day practice, you should get one. I cannot imagine practicing law without the assistance of a case management program. My understanding is that the more popular ones are Amicus, PCLaw, and Time Matters. Because I have used the first two, I am going to compare them here. A few points to note:

1. I am not, by any means, a "techie." This translates into this review being pretty basic.
2. I have had, and you should too, good outside computer support and consultants.
3. I aggressively use the features available in the case management systems.
4. I "left" Amicus about one year ago and cannot opine as to what improvements Amicus might have made since then. I left in part because the cost of upgrading for the slight improvements in functionality was too high and Amicus has a habit of cutting off support of its older versions. In other words, update or risk losing all your data.
5. Many firms use Amicus for case management and PCLaw for accounting (billing and financial reporting). This was the model I used for 14 years until we abandoned Amicus entirely and decided to use PCLaw for both case management and billing/financial purposes.
6. Amicus has an accounting module, but it has not been successful or widely adopted.
7. Case management systems are big consumers of storage space and server capacity and, because these programs try to accomplish so much, they seem to me to be fairly unstable (i.e., they "crash" with a modicum on annoying frequency). Both programs have come up with a "SQL" (sequel) version which is supposed to have made them more stable. Unfortunately, this was not my experience with either Amicus' SQL version or with PCLaw. If any reader uses the SQL version of either of these programs and has found them to be very stable, please call me because I would like to discuss this with you! (seriously).

AMICUS v. PC LAW

I. Contacts

Amicus Pros:

1. You can assign a Contact to a group, such as Financial Planner or Insurance Agent. You can create as many groups as you wish and you can make global changes to those groups.

2. You can create a tickler to remind you that it has been more than XX days since you contacted the person.

3.You can add notes about a contact (such as "long term care insurance") and you can then search with the push of a button all Contacts to derive a list of, say, insurance agents who sell long term care insurance.

4. You can export the names to Constant Contact for mass mailings (PC Law, too)

5. You can attach a Contact to a particular file so, if you wanted to see how many files Financial Planner Jane Doe referred to you, you can pull up her Contact and hit a button to show all files with which she is associated (assuming that you remember to attach her as a Contact to the file of each client she refers to you). (PC Law, too)

Amicus Cons:

1. If you are not careful, you can add the same person to your Contacts more than once by using a different name for them. If you do, Amicus does not know the difference between, say, Jan Smith, Janet Smith, Jan C. Smith, and Janet C. Smith, even though they might all be the same person. Amicus will alert you if you do enter the same name, but this is not foolproof. The real "con" is that, to delete a duplicate entry, you must delete the duplicate names on each and every workstation—there is no global solution.

PCLaw Pros:

1. I am not sure there are any real "pro's" here. I have found the Contact module to be fairly clumsy to use.

PCLaw Cons:

1. This is pretty much the opposite of Amicus' pros. You can't use search terms to search for a particular attribute of your Contact (for example, all Contacts who have Parkinson's). You can assign a Contact to a group (such as "Real Estate Agents"), but good luck when you want to change that Contact to a different group; the process is cumbersome and causes PCLaw to crash.

2. PCLaw does not allow a Contact to be deleted from the system, hitting "delete" actually sends it to an inactive status and will still show up in your Contact export when creating a mailing list. PCLaw does not allow the global change to a contact type, if you want to combine contact types you would have to manually change each and every entry.

II. Emails

Amicus Pros:

1. By merely clicking on a Contact's email address, the email, which works through Outlook, is automatically saved to that Contact's profile and, if you had emailed the Contact by going through the File with which they are associated (more on this later), the email is also automatically saved to the File too. There is nothing you need to do—the email is saved automatically. In addition, if you are in the File module and the File has eight Contacts associated with it, by highlighting the Contact names and then right clicking on email, the email opens up in Outlook with all the addresses filed in and the "subject" is also filled in with the file name. All emails are saved to a File chronologically.

Amicus Cons:

1. None really to mention, other than that the description of the email that is automatically saved is somewhat sparse and, if you are in a File and looking for a particular email and there are lots of emails saved to the File, it could take you a while to find it even though the emails are saved in chronological order.

PCLaw Pros:

1. When an emailed is saved to a Matter (a "Matter" is the equivalent to an Amicus "File), you have the ability to fill out a profile for the email in which you can be very descriptive. This would make it easier to locate a particular email later on in a Matter for which there are lots of email exchanges.

2. The other pro is that when you receive an email with a bunch of documents attached to it, either Word or pdf, when you save the email to a Matter, the documents are also automatically saved as part of the email. But they are accessible only through the email. If you want to save the attachments as documents to the Matter, you can do so easily for the Word document by opening it and saving it directly to the Matter. But for the pdf document, you need to open it, save it somewhere in your computer (your hard drive?) and then, from there, you can save it as a document in the Matter.

PCLaw Cons:

1. First, let's say you are in a Matter (this is the module where all the action takes place) and you want to email three Contacts associated with that Matter. You can't. You can only do one Contact at a time. If you want to send the same email to three Contacts, you first have to copy, one at a time, two of the addresses into a Word document. You can next click on the third Contact's email address and the email opens with that Contact's address in it. You then copy the two email addresses you had pasted into the Word documents and paste them into the email. Why can't you just copy and paste into the email directly? Because PC Law does not allow you, once you originate an email from a Contact, to then go back into PCLaw. You are "frozen out" until you send off the email.

For documents, you can email multiple documents by clicking on the specific documents that are part of the Matter (all documents are saved to a Matter), but then you still have the same problem with adding in email addresses.

III. File Management (Amicus) and Matter Management (PCLaw)

These modules are the primary entry point to accessing a client's file. Both programs adequately allow you to keep track of appointments for the file, tasks completed and yet to complete, reminder functions to make sure you are aware of upcoming dates, save emails, and whatever else you might want to manage on a client's file. Amicus is the hands down winner here in terms of appearance and ease of use. In terms of appearance, Amicus is set up to act like a hard copy file—the left hand side is all the Contact data and the left hand side is everything else. PCLaw is clunky and visually not very appealing. Both programs allow you to have several different tabs on which to store information and both allow you to, with relative ease, look at different matter within a File or Matter (Contacts, Appointments, Completed tasks, tasks yet to complete, etc…)

Calendar View:

In Amicus, you can view on one screen the calendar of multiple users in neat, separate columns. But PC Law's calendar view is similar to an Outlook calendar such that if you opt to simultaneously view the calendars of multiple users, their appointments are scattered about one single calendar making it difficult to find a person.

SYNCING WITH OUTLOOK, SYNCING TO PHONE:

PCLaw Con:

1. All of PC Law's functions will slow down drastically and the program will spontaneously crash if you try to sync your calendar to Outlook (which then allows you to view your calendar from your cell phone). Changes to appointments, whether they are edited or deleted, from a phone will not show up in the PC Law calendar. PC Law does offer "PC Law Mobility" which is an "app" for your cell phone that allows viewing of the PC Law calendar, but no changes can be made to your calendar from the app so, if you are "on the road" and want to add an appointment to your calendar, you can't.

Amicus is capable of syncing with Outlook without losing any other functions in Amicus, but the synching in Amicus Premium 12 was inconsistent. If an appointment was deleted from Outlook, it might still show up in the Amicus calendar and vice versa. However, I did hear that Amicus reprogrammed this function in Version 14, so that all changes are instantaneous across all devices!

IV. Knowledge Management

PC Law Con:

1. Has no version of a library or knowledge management system whatsoever.

Amicus Cons: None

Amicus Pros:

1. Amicus excels here. You can add any type of document or web page to a Library. The library allows you to create your own taxonomy. You store in the appropriate "book" on the appropriate "shelf" in the appropriate "section" of the library. When you enter the item in the library you can add search terms as well. So, if you are looking for something on the estate taxation of non-resident aliens, you can find it by either typing in a relevant search terms (such as "alien" or "non-resident") or by just browsing through the book in that section of the Library. I found this function to be incredibly useful in managing firm knowledge.

CONCLUSION

You cannot go wrong with either program. If you are not using a case management system now, anything will be an improvement over your current system, whatever it might be. PCLaw can stand by itself for case management and billing/financial reporting, but Amicus cannot—it will need to be paired with something for the billing/financial reporting. If you use the Amicus/ PCLaw combination, you enter your time in Amicus and each evening it "talks" to PCLaw to exchange the data. Amicus has an edge in the pure case management arena, and its Knowledge Management function (called the "Library") only extends that edge further.

Good luck in your selection(s). ■

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Defending Nursing Facility Collection Actions: Whether Meadowbrook V. Buchman, 149 Conn. App. 177 (2014), is a Positive Development

by Attorney Carmine Perri

Tracking the evolution of nursing facility collection actions has become somewhat of an obsession of mine. In the past couple of years, there have been a number of decisions that have been issued by our courts that have altered, in my opinion, the manner in which nursing facility collection actions should be defended. The topic of this article is to determine whether a recent Appellate Court decision, *Meadowbrook v. Buchman*, 149 Conn. App. 177, 90 A.3d 219 (2014), is one of those decisions.

I. Relevant Factual Background

The defendant, Robert Buchman, signed as responsible party when his mother, Maude Buchman, was being admitted into the Plaintiff's nursing facility. For approximately the first year and a half of Ms. Buchman's admission, she was a private pay resident. Once Ms. Buchman's assets were exhausted, a Medicaid application was filed with the Department of Social Services (herein "the Department" or "DSS"). The Department sent two letters to Robert requesting that he provide information regarding his mother's Medicaid application. The Department then "denied the Medicaid application, stating as the basis for denial: 'You failed to give us enough information or verification we need to prove you are eligible.'" *Id*. at 181. At the time of Ms. Buchman's death, she owed an unpaid balance of $99,820.78 to the Plaintiff. *Id*. "The parties stipulated to the trial court that if the department had granted Medicaid benefits to the defendant's mother, the department would have paid the facility $47,561.18." *Id*.

The Plaintiff sued Robert claiming, among other claims, that he breached the Admission Agreement by failing to provide the Department with the requested information for Ms. Buchman's Medicaid Application. Robert, in his defense, argued that: (1) the Plaintiff failed to name him in his capacity as conservator of his mother's estate and, therefore, any evidence of his conduct as a conservator were irrelevant to the issues before the court; (2) the Admission Agreement did not impose any personal liability except if a responsible party has received a transfer of assets that results in the resident's ineligibility for Medicaid; and (3) that the Plaintiff did not prove that Ms. Buchman would have qualified for Medicaid even if the requested information had been given to the Department. *Id*. at 182.

II. The Trial Court's Decision

After the Plaintiff's case in chief, Robert moved for summary judgment arguing that the existence of the three defenses above established that there was no genuine issue of fact which necessitated a judgment in Robert's favor. The trial court, Judge Robert Hale, denied Robert's motion for summary judgment. After the court denied the motion for summary judgment, Robert rested, choosing not to call any witnesses.

After a recess, Judge Hale issued an oral decision in the Plaintiff's favor and awarded damages in the amount of $47,561.15 plus attorney's fees to be determined post-judgment. *Id*. at 184. Robert appealed.

III. The Appellate Court's Reversal

On appeal, among other arguments, Robert claimed that the trial court's award of damages was impermissibly speculative since, Robert argued, "the plaintiff failed to adduce any evidence to support the court's finding that his breach of the aforementioned contractual obligations 'caused the plaintiff to lose the Medicaid money.'" *Id*. More specifically, Robert's counsel argued, "there has been absolutely no evidence, not one scintilla of evidence that if [defendant] had provided this [financial] information that Maude Buchman would have qualified for Medicaid . . . ." *Id*.

The Appellate Court reversed the trial court's decision since the Plaintiff failed to establish that, had Robert complied with his purported obligations under the Admission Agreement, the Department would have granted and the Plaintiff would have received Medicaid benefits. *Id*. at 191-192. Specifically, the Appellate Court stated:

> The testimonial evidence submitted to the court demonstrated, on the one hand, that submitting the proper information to the department merely triggered a review of the resident's eligibility and, on the other hand, the submission of such information was not a guarantee of approval to receive such benefits. John Leveque, an eligibility services supervisor at the department, testified that the department could not determine whether an applicant qualified for Medicaid absent a review of the applicant's financial information, which was not furnished to the department in the present case. As the defendant notes in his appellate brief, the plaintiff did not ask Leveque "if, based upon the defendant's testimony regarding the assets maintained by [his mother], he had an opinion regarding whether . . . [she] would have qualified for [such] benefits." In addition, the record before us does not indicate that the plaintiff was prevented from presenting the proper financial documentation, expert testimony, or other evidence that would have otherwise established the resident's likelihood of approval, nor has the plaintiff in this appeal directed our attention to any such evidence. *Id*. at 192.

The Appellate Court's decision is a wonderful result for Robert, and his attorney, however, there are positives and negatives to the *Buchman* holding; *Buchman* is unlike the case of *Aaron Manor, Inc. v. Janet A. Irving*, 307 Conn. 608, 57 A.3d 342 (2013), which, in my opinion, was a positive development with no negatives.

a. The Positives of the *Buchman* Decision

There are some positives that come out of the *Buchman* decision. The first positive is a general one, the greater number of successful defense cases should lead to a greater consideration by the nursing facilities regarding whether they will file suit against non-residents in the first place. The next positive is that the import of the Appellate Court's holding is that similarly situated plaintiffs must not only have their claims lined up, but also their witnesses, exhibits, and experts to support those claims. It is one thing during trial to make a claim or allegation, it is another thing to get a witness or expert to testify in support of that claim or allegation; in *Buchman*, John Leveque's testimony actually hurt the Plaintiff's case. Lastly, this should be another case where, pursuant to General Statutes Section 42-150bb, a defendant is entitled to attorney's fees after successfully defending a nursing facility's suit. See Conn. Gen. Stat. §42-150bb (2014) and *Aaron Manor, Inc. v. Janet A. Irving*, 307 Conn. 608, 57 A.3d 342 (2013).

b. The Negatives of the *Buchman* Decision

Unfortunately, *Buchman* is not without a number of negatives.

First, the majority's disagreement with Judge Schaller's concurrence is particularly disconcerting; the majority stated "we disagree with the concurrence that the [trial] court improperly concluded that the defendant could be held personally liable for breaching specific contractual obligations that he voluntarily elected to undertake." *Id*. at 212. Putting aside for another time a discussion of federal and state law, all of which preclude third party guarantors of payment, and putting aside for another time that Robert, like other responsible parties, is being held personally liable, *no one* signs these admission agreements voluntarily. Almost unequivocally, family members and friends are shepherded into the admissions office where they are greeted with a smile, maybe a warm cup of coffee, advised that they cannot be held personally liable for signing the admissions agreement, advised that they are merely the "emergency contact person," and told to sign the tabbed pages (which were tabbed far in advance of the meeting).

Next, there is no mention in the decision that the Admission Agreement is void for lack of consideration or that it is an adhesion contract. The majority states the following:

> Thus, the plaintiff's alleged loss is not predicated on the financial obligations of the defendant's mother. Rather, it is predicated entirely on the loss allegedly incurred as a result of the defendant breaching his contractual obligation to provide all requested information to the department and timely establish his mother's eligibility for Medicaid. *Id*. at 211-212.

Despite the majority's discussion regarding contract law and its damages analysis, there is no discussion that the Admission Agreement is void for lack of consideration although Robert received no benefit for signing as responsible party (whether the Parties raised this issue is a different question). Additionally, there is no treatment of how the Admission Agreement was explained to Robert prior to him signing since, as we know from representing clients like Robert, oftentimes the admissions office advises the responsible party to "not worry" and that the nursing facility "will assist with the Medicaid application," only to point its finger at the purportedly responsible party when a mistake is made.

Finally, the *Buchman* decision will serve as a roadmap for nursing facilities in the future specifically as to how it should establish the necessary link between causation and damages; put simply, it may become the instruction manual for establishing damages. It should come as no surprise that nursing facilities will now cite *Buchman* and claim that the evidence in their case, unlike the evidence in *Buchman*, establishes that the responsible party's actions, or omissions, resulted in the facility's damages.

IV. Conclusion

Returning to the initial question, is *Buchman* a positive development when defending nursing facility collection actions? As to the damages component of a nursing facility collection action, it certainly is. As to Judge Schaller's concurring opinion, and his reasoned reflections within that concurrence, it certainly is. Unfortunately, as to the majority's opinion, other than its damages analysis, it still reflects the unwillingness to look at admission agreements for what they are, unconscionable. As we too often know, when an unconscionable admissions agreement is coupled with a deceptive admissions interview, the results can be disastrous for our clients and their family members. ■

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A Review of Medicaid Rules Regarding Liens on Home Property

by Elizabeth N. Byrne and Jason L. Lewellyn

Practitioners may have noted the recent list-serve discussion of an improperly recorded Department of Social Services (DSS) lien on home property owned and occupied by a community spouse. Initially it was not clear whether the lien was recorded as part of some new DSS policy, or by mistake. Upon further review, it appears that the lien was recorded by DSS as a result of client error when completing initial eligibility or redetermination paperwork.[i] But the list-serve discussion has prompted a review here of the applicable Medicaid rules.

As most recall, federal law prohibits a lien from being imposed against the property of any individual who has received the benefit of medical assistance under a State plan, prior to the individual's death, except under certain limited exceptions.[ii] One exception noted in federal law is when the lien is imposed against an individual's property pursuant to court judgment on account of benefits improperly paid to the individual.[iii]

The other exception is when an individual owns real property, and is himself confined to a nursing home, intermediate care facility for the mentally retarded, or other medical institution, and is required, as a condition of receiving services to spend all but a minimal amount of income for medical care, and the individual cannot reasonably be expected to be discharged from the medical institution to return home.[iv] When these criteria are all satisfied, federal law allows the recording of a lien on the individual's real property, unless the real property is the home occupied by any of the following persons: the spouse of the individual;[v] the individual's child who is under age 21, or blind or disabled;[vi] or a sibling of the individual who has an equity interest in the house and who was residing in such individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution.[vii]

In the State of Connecticut, the law pertaining to the eligibility of a medical assistance applicant owning an interest in real estate and the lien of the State on such real property is set forth at Connecticut General Statutes § 17b-79. That statute provides, in applicable part:

> No person shall be deemed ineligible to receive an award under the state supplement program, medical assistance program, … for himself or herself … by reason of having an interest in real property, maintained as his or her home, provided the equity in such property shall not exceed the limits established by the commissioner.
>
> The commissioner may place a lien against any property to secure the claim of the state for all amounts which it has paid or may thereafter pay to such person or in such person's behalf under any such program, or to or on behalf of any person for whose support he or she is liable, … The claim of the state shall be secured by filing a certificate in the land records of the town or towns in which any such real estate is situated, describing such real estate…. Conn.Gen.Stat. § 17b-79 (2014).

The policy of the Connecticut Department of Social Services is to place a lien on an individual's property, both real and personal, if a court has judged that the individual received Medicaid benefits incorrectly,[viii] and on the individual's real property when the individual cannot reasonably be expected to return home.[ix] However, in accordance with federal law, it is the Department's policy not to place a lien on the individual's real property that was used as the individual's primary residence prior to entering a long-term care facility when any of the following relatives reside in the home: the spouse of the individual; the individual's child under age 21 or who is blind or permanently disabled; or a sibling of the individual who has an equity interest in the home and who has lived in the home for a period of at least one year immediately prior to the date of the individuals admission as an inpatient.[x]

When an individual receiving Medicaid benefits is discharged from a medical institution and returns home, any lien imposed under §1396p(a)(1)(B) shall dissolve,[xi] and DSS will remove any lien placed against the property upon the individual's discharge from a long term care facility and return home. The length of institutionalization will not affect the removing of the lien, and the removal of the lien does not preclude DSS from later making a claim against the individual's estate.[xii]

The lien rules pertaining to individuals receiving Medicaid benefits and owning home property (or other real property) seem clear; and practitioners routinely recommend such individuals to transfer their home property to community spouses, or sometimes to a disabled or minor child, so that the home property is protected from DSS lien altogether. So, why the confusion?

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[i] The attorney who reported the improper lien on the list-serve indicated that DSS did at least initially suggest that it may have a legally liable relative claim to justify the lien, citing, among other statutes, C.G.S. § 17b-79, "… The commissioner may place a lien against any property to secure the claim of the state for all amounts which it has paid or may thereafter pay to such person or in such person's behalf under any such program, or to or on behalf of any person for whose support he or she is liable…" (emphasis added). However, DSS did release the lien (without requirement of payment) so that a scheduled real estate closing could proceed.

[ii] 42 U.S.C.A. §1396p(a)(1)

[iii] 42 U.S.C.A. §1396p(a)(1)(A)

[iv] 42 U.S.C.A. §1396p(a)(1)(B)

[v] 42 U.S.C.A. §1396p(a)(2)(A)

[vi] 42 U.S.C.A. §1396p(a)(1)(B)

[vii] 42 U.S.C.A. §1396p(a)(1)(C)

[viii] CT Dept. of Social Services, Uniform Policy Manual 7510.15.A.

[ix] CT Dept. of Social Services, Uniform Policy Manual 7510.15.B.1.

[x] CT Dept. of Social Services, Uniform Policy Manual 7510.15.B.2.

[xi] 42 U.S.C.A. §1396p(a)(3)

[xii] U.P.M. §7510.15. D.

[xiii] That the community spouse himself or herself is confined temporarily to a health care facility should not affect the reporting of the community spouse's "residence" on the W-1 LTC application.

It is probable that the 2013 revised form of the Long-term Care/Waiver application (Form W-1 LTC) is contributing to the confusion in this matter, as DSS inquires about the applicant's real property in at least four different sections of the application. Specifically:

- Section B (page 4) requests information regarding, *"Current Address of Your Home or Institution/Long Term Care Facility. Tell us about your home or long-term care facility, if you live in one."* Next it asks, *"What is the address of your home?" "Is this your mailing address?"* It follows with, *"Do you or your spouse own your home?"* [Then] *"If you live in a facility, what is the name of the facility"*;
- In Section C (page 4), DSS requests that the applicant list prior addresses, if the applicant has not lived at the current address for the last five years;
- Section M (page 10) has more specific questions regarding real property, inquiring *"Do you and/or your spouse own or have legal interest/life use in any "**other**" real property?"* (emphasis added). The application continues, *"**If yes,** answer the following questions."* The very first box to check relates to *"primary residence"* which, arguably, has already been reported in Sections B and C and therefore is not "other" real property and should not be referenced here;
- Then, way down in Section Q (page 14) of the W-1 LTC application are two more real estate questions relating to "Allowances and Diversions". The first question is whether the applicant has a spouse, child under 21 or other dependent relative living in the applicant's home in the community. The second question is *"If you are in a long-term care facility, do you intend to return home within 6 months."*

Of course, knowing the federal and state laws regarding liens of home property, practitioners should indicate in every section where asked that the applicant is residing in a facility and that the applicant's spouse [owns and] occupies the real property in the community as his or her home. The failure to (1) identify the home property consistently throughout the W-1 LTC application, or (2) confirm the residence of the applicant's spouse (at home)[xiii] may lead to an inadvertent DSS lien on the home property. ■

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Medicaid Recovery Claims

by Malcolm F. Barlow

Medicaid recipients are subject to the recovery claims of the State of Connecticut for the aid they received. Recovery claims can be made upon the recipient's death, upon receipt of an inheritance, or upon receipt of the proceeds of a cause of action, e.g., a personal injury lawsuit. The funds recovered by the State may be modest compared to the amount paid out by the State. Usually there is little to recover, since a person has to be impoverished to be eligible for the needs-based benefits.

However, circumstances can change. Assets may come to a recipient. The State takes a keen interest in them. State laws allow it to recover its Medicaid costs, as well as similar aid provided.

I. Collectible At Death

When recipients die, the State Department of Administrative Services (DAS) has plans for their estates. DAS is the State's debt-collection arm. The application to probate an estate asks whether the deceased had received aid or care from the State. The court notifies DAS of all deceased persons. (See Connecticut General Statutes §45a-355). The court also provides the names of beneficiaries of the estate. DAS grinds all this information through its database. When names of aid recipients turn up (either the deceased or beneficiaries), DAS sends claim notices to the court and to the estate's fiduciary.

The Connecticut General Statutes that DAS relies upon the most for recovery from recipients' estates are: §§ 17b-93, 17b-94, and 17b-95.

Under Conn. Gen. Stat §17b-93, the State may recover from a beneficiary of aid who "…has or acquires property of any kind or interest in any property, estate or claim of any kind…" An exception is "moneys received for the replacement of real or personal property."

The State's claim has priority over all other unsecured claims and unrecorded encumbrances. It is for the full amount paid by the State to or on behalf of the deceased, or to a beneficiary of the estate. (Conn. Gen. Stat. §17b-95(c)).

II. Proceeds of a Cause of Action

An exception to the State's wait for the death of the recipient is in Conn. Gen. Stat. §17b-94, which limits the State's recovery from the proceeds of a cause of action, such as an award from an auto accident. The State is limited to recovery of the full amount paid, or 50% of that amount, after all expenses of the claim or suit have been deducted. This State lien on lawsuit proceeds has priority over all other claims except attorney's fees, suit expenses, and costs of hospitalization connected with the suit.

For example: The State paid $50,000 for the medical bills of an auto-accident victim. The accident victim sues the driver who caused the accident and wins a payment of $300,000. The victim's attorney takes a $100,000 fee. Costs of suit are $10,000. The victim paid $10,000 out-of-pocket for his medical bills. This left the victim/beneficiary net proceeds of $180,000. The victim/beneficiary has to repay the State the full $50,000 paid by the State for the victim's medical bills due to the accident. The victim keeps a net total of $130,000 of the gross case proceeds.

Another example: The State paid $50,000 for the medical bills of an auto-accident victim. The victim sues the driver who caused the accident and wins a payment of $90,000. The attorney takes a $30,000 fee. Costs of suit are $10,000. Out-of-pocket medical bills are $10,000. This leaves net proceeds to the victim of $40,000. The victim must repay the State 50% of his net proceeds. Therefore the victim pays $20,000 to the State. In this second example, the victim/beneficiary remains obligated to the State for the balance of the $50,000 in aid; that balance being $30,000.

III. Lifetime Limit

The State cannot seek recovery from a Medicaid recipient during the recipient's lifetime; except for pressing its claims in the event of a cause of action and an inheritance. *State v. Murtha*, 179 Conn. 463 (1980); 42 U.S.C. §1396p(b)(1)(B); and Conn. Gen. Stat. §17b-95.

In the *Murtha* case, Vera Sullivan applied for Medicaid in 1966 to help her pay her nursing home fees. She qualified due to having less than the maximum assets and income allowed under the Connecticut statutes at the time. Then, as now, these asset and income levels were low. Today's asset limit is $1,600 in liquid assets. The income maximum is anything less than the costs of the nursing home.

Vera's sister Anna Ahern died in 1977 leaving Vera one-third of her estate. Vera filed a disclaimer of her share (about $60,000). The Superior Court ruled that the disclaimer was invalid due to the State's claims against Vera for the money it paid for her benefit since 1966.

Connecticut's Supreme Court reversed. It ruled that Vera's disclaimer was valid. However, the Supreme Court also ruled that the State could reassess Vera's eligibility for aid and, in light of Vera's disclaimer of the $60,000, could deny her continuing aid. If she had accepted the $60,000, Vera would have been ineligible for aid until she spent it down. Vera's disclaimer amounted to a gift resulting in a penalty period.

Although Vera seemed to have won, she actually lost. Vera's lesson to us is to be careful when electing to disclaim an inheritance after receiving State aid.

IV. Other Limits

The State cannot recover for payments properly paid to or for a person under age 55. (See 42 U.S.C. §1396p(b)(1)).

Also, the State must wait to seek recovery if any of the following are true: The recipient's spouse survives; he/she has a child under the age of 21; or has a child who is blind, or permanently and totally disabled. And the State cannot put a lien on a recipient's home when a sibling is residing in the home for a period of at least one year before the recipient's admission to a medical institution. Finally, the State cannot lien the home when a son or daughter of the recipient resides in the home for at least two years prior to admission, and "who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution." That son or daughter must have lawfully resided in the home on a continuous basis since the date of the recipient's admission to the medical institution. (See 42 U.S.C. §1396p(b)(2)).

The State shall waive collection if such action would cause an undue hardship on the recipient. Federal law requires each state to follow standards for defining hardship as set out by the secretary of the Social Security Administration. (See 42 U.S.C. §1396p(b)(3)(A) and (B)).

V. Limits on Liens of the Home

See the article included in this CT NAELA Practice Update for a discussion of these rules.

VI. Life Use in Home; Unavailable Resource

The State Department of Administrative Services (DSS) will disregard the life use of an applicant in his/her home during the Medicaid review process. (See CT DSS UPM (Uniform Policy Manual) 4030.35 2.b.) A life use is an inaccessible asset if the life tenant leaves the home and is unable to find someone willing or able to purchase the life use. A buyer is not likely to buy just a life use in someone else's home. And if the remainder interest holders refuse to join in a sale of the whole property, the life use is unavailable as a resource.

The State may lien the applicant's life use interest in the home under 42 U.S.C. §1396p(a)(1)(B)(ii) as long as no other exception applies and the applicant is not expected to return to the home.

An applicant may succeed in obtaining Medicaid to help pay for nursing home care, yet still own a life use in a home. Under CT DSS UPM (Uniform Policy Manual) 4030.35, the applicant may keep the life use so long as it cannot be sold. Also, if the life use right is rented, and there is net income therefrom, that income must be applied to the nursing home costs before DSS will make up the difference with Medicaid. The applicant would then become a Medicaid beneficiary with a life use liened by the State.

If the remainderman and the Medicaid beneficiary sell the home, the State will insist that the beneficiary receive the full value of the sale of the life use interest. The calculation for determining that life use is at CT DSS UPM (Uniform Policy Manual) P-4030.30.

An example of the life use sale calculation as adapted from CT DSS UPM (Uniform Policy Manual) P-4030.30 is as follows: Net value of property, perhaps at the sale of it, is $100,000. Take 5% or $5,000. The applicant is a man age 70 with an actuarial factor of 6.9882. Multiply the $5,000 by 6.9882 resulting in $34,941, the amount of the applicant's share of the $100,000. The beneficiary must now spend down that $34,941 to regain eligibility for Medicaid – perhaps for a funeral trust, or on clothes, proper dental work, orthopedic shoes, and even payments to the nursing home for a while.

Note that if the applicant still holds the life use upon death, the life use is extinguished. The State cannot recover any part of the life use.

Many family members who are the remaindermen of property subject to a life use do not wish to wait for the applicant's death. Sometimes they cannot afford to wait, for example, when the house needs to be sold. Therefore, they sell the home subject to the life use and pay that life use to the beneficiary, who then

must spend down the money. The State often receives the indirect benefit of such sales of life use interests. State payments to the nursing home are suspended as the new spend down is completed.

In this example, and in effect, the State recovers funds even though the Medicaid recipient is still alive.

VII. A Related Lien on Inmates

Inmates of the State Department of Correction are subject to repaying the State for room and board and other costs they incur during incarceration. (See Conn. Gen. Stat. §§18-85a, 18-85b, and 18-85c.) The State's claim may be filed against the person's lawsuit proceeds, his inheritance, or his estate. Note that the State cannot go after lawsuit proceeds or inheritance funds if the inmate had been released more than 20 years before.

The State's claims against inmates is meant to cover the State's costs at the time of incarceration for room and board, education and vocational programs, family visits, dental procedures, eyeglasses, and lab tests to detect drug use (when tests are positive). In my office, we most recently saw a DAS claim against an ex-inmate's estate of $93 per day of incarceration. Since the time served was a year (under the DUI laws), the State's claim was about $34,000. The estate paid it in full.

The federal Medicaid limits for collection against persons who were incarcerated while under the age of 55 do not apply to these collection laws.

VIII. Seizure Rights on the Estates of Paupers

The estates of paupers who left any assets behind are subject, at death, to the State's seizure rights under Conn. Gen. Stat. §4a-16. The State's rights under the statute are limited to estates that that do not include real property and total less than $40,000 in assets. If the State does the seizure, it may pay up to $375 of funeral expenses under Conn. Gen. Stat. §17b-84.

IX. Legally Liable Relatives

Legally liable relatives are: the spouse of the recipient, and the parent of a recipient, which recipient was under age 18 at the time of the aid. (See Conn. Gen. Stat. §17b-223(c)).

Also liable for the aid paid for a recipient are the guardian of a child, the conservator, and the Social Security payee. However, the liability is limited to the funds received and held by these fiduciaries for the recipient's benefit. *Id*.

X. The Reluctant Widow

A case that sheds light on the legally liable relative issue is *Wilton Meadows Ltd. Partnership vs. Coratolo*, 299 Conn. 819 (2011).

Carmen Coratolo entered the Wilton Meadows nursing home in August 2006. From then to October 2007, Wilton Meadows provided Carmen with care and services including "assistance with daily living activities, general nursing care, meals, room and board, and the administration of medication." *Id*. at 821. But until March of 2007 Carmen did not pay for the care, and his bill ran to $60,795.32. His wife, Sally Coratolo, refused to pay it. When Carmen died, Wilton Meadows sued Sally under Conn. Gen. Stat. §46b-37, "Joint duty of spouses to support family. Liability for purchases and certain expenses. Abandonment."

Justice Norcott wrote the majority opinion which supported Sally's claim that she was NOT liable for the $60,795.32. He repeated the key language of Conn. Gen. Stat. §46b-37(b):

> [It] shall be the joint duty of each spouse to support his or her family, and both shall be liable for: (a) the reasonable and necessary services of a physician or dentist; 2) hospital expenses rendered the husband or wife or minor child while residing in the family of his or her parents; (3) the rental of any dwelling actually occupied by the husband and wife as a residence and reasonably necessary to them for that purpose; and (4) *any article purchased by either which has in fact gone to the support of the family, or for the joint benefit of both…* [Emphasis added.]

Justice Norcott wrote that an "article" referenced in the statute could not apply to the services rendered Carmen. Carmen, not Sally, had consumed the food and medicine provided by Wilton Meadows. Therefore, even that portion of the claim did not meet the statute's requirements.

He noted that the spousal liability created under the statute "is in derogation of the common law and created liability where formerly none existed." Id. at 825. He found that "articles" in the statute are not the "assistance with daily living activities, general nursing care…and the administration of medicine."

Justice Norcott noted that the specifics in the statute did NOT include nursing home expenses. "Certainly, if the legislature had intended to extend spousal liability to include nursing home expenses, it could have expressly done so, as it did, for example, with hospital expenses in §46b-37(b)(2)." The opinion was unanimous; the nursing home lost. (A Connecticut NAELA member, Atty. Carmine Perri, represented Sally Coratolo.)

XI. Nursing Home Tools for Collection

The State General Assembly passed PA-13-0234 which is now part of Conn. Gen. Stat. §17b-261q, "Action by nursing home facility to collect debt for unpaid care provided during penalty period." It now allows a nursing home to sue the recipient of its care as well as the transferee of gifts that have made the recipient ineligible for Medicaid. This took effect October 1, 2013.

An older tool is Conn. Gen. Stat. §17b-261a(b) dealing with transfers resulting in penalty periods for Medicaid eligibility. Any such transfer "shall create a debt" payable by the transferor or transferee to the State Department of Social Services (DSS). This may not directly benefit the nursing home, but it can be used as pressure in getting family members to return gifts made within the 5-year look-back period.

XII. Spousal Election

Connecticut's law on the minimum spousal share is contained in Conn. Gen. Stat. §45a-436. Succession upon death of spouse. Statutory share. At Conn. Gen. Stat. §45a-436(a), the "statutory share" means a life estate of one-third of value of all the property passing under the will, real and personal, legally or equitably owned by the deceased spouse at the time of his or her death, after the payment of all debts and charges against the estate. The sur-

viving spouse has a right of electing to take whatever is given to him/her under the deceased's will, or to take the "statutory share."

An example: A wife, the "institutionalized spouse" under Medicaid, becomes eligible for Medicaid in a nursing home. Her husband, the "community spouse," writes a by-pass will and dies leaving all to the couple's children and nothing to his wife. The net estate is $300,000. The wife, age 70, and on Medicaid for several years, makes a timely election against the estate. She must make the election in order to maintain her eligibility; the State will deem a failure to make the election as a gift which will trigger a penalty period. The fiduciary of the estate sets aside one-third or $100,000 in a trust account. The fiduciary pays to or for the benefit of the wife the income of the $100,000 trust until the wife dies. The fiduciary then passes the $100,000 to the children.

The State provides a formula for determining the value of the spousal life estate which depends upon the age of the spouse and the size of the trust. (See CT DSS UPM (Uniform Policy Manual) § P-4030.30. There have been discussions about using a more up-to-date life expectancy chart, but no changes have been made to date. The age factor drops steadily with age. A 100-year-old woman has a factor of 1.2716.

In the example above, the current formula works as follows: $100,000 X 5% X 8.1615 (the age factor for a woman of 70 years) = $40,807.50.

If the State is making a claim for the spousal share, it wants to cash it out for the present value. In our example, this would be the $40,807.50. If the wife in our example did not make the spousal election, the State will deem her having made a transfer of $40,807.50. This will affect her eligibility for Medicaid, or terminate Medicaid if already granted. She can reapply upon spending down the $40,807.50.

The statute, Conn. Gen. Stat. § 45a-436, does not require the spouse to demand a lump sum present value payment, a cash-out, and it does not require the fiduciary to obey her demand if she did make it. The fiduciary could make a safe investment of the $100,000 and pay to or for the spouse all the income from it. If the surviving spouse appears about to die, this makes economic sense.

However, the State has been insistent on lump sum payments of the spousal share's present value. In most instances, the fiduciary, and the ultimate beneficiaries of the spousal share upon the spouse's death, all agree it would be in everyone's best interest to pay the $40,807.50, close out the estate, and distribute the balance of the spousal share as the husband's will directed.

My fiduciary clients have all chosen the cash-out route. Not one has yet chosen to set up the trust for the spousal share.

XIII. Summary of State Laws on Recovery Based on Federal Medicaid Requirements

For a state to receive federal Medicaid funds (about 50% of all Medicaid benefits paid in Connecticut), it must comply with 42 U.S.C. § 1396p. It provides that states cannot collect until the recipient has died. But then it provides for broad collection action. For example, the "estate" of the deceased aid recipient:

> (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 (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), 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. 42 U.S.C.§ 1396p(b)(4).

Connecticut has statutes to allow for much of this broad recovery. They include:

- Conn. Gen. Stat. §4a-16 allowing the State to seize estate assets (not real estate) totaling less than $40,000;
- Conn. Gen. Stat. §17b-93 calling for the claim to be against "property of any kind or interest in any property, estate or claim of any kind;"
- Conn. Gen. Stat. §17b-94 allowing the State to take a share of the proceeds of a lawsuit;
- Conn. Gen. Stat. §17b-95(d) giving the State a claim against the proceeds of an annuity;
- Conn. Gen. Stat. §36a-292(a) regarding the State's claim against a deceased's share of a joint bank account;
- Conn. Gen. Stat. §45a-355 requiring the Probate Court to inform the State Department of Administrative Services (DAS) of all names in a new estate so that DAS can check its database for aid recipients, and a chance to recover aid funds; and
- Conn. Gen. Stat. §45a-365(4) creating a high priority right for the State's claim for payment of its aid lien.

XIV. Summary

The State's rights are broad in recovering aid given to Medicaid recipients and others. Generally, the State cannot recover Medicaid aid until the death of the recipient. Exceptions include recoveries under causes of action and receipt of an inheritance. The State may lien homes and life estates. Death of the recipient's spouse may trigger the spousal election claim by the surviving institutionalized spouse, which could result in the State's challenge to the surviving institutionalized spouse's continued eligibility for aid. The estates of prison inmates must pay the State room and board fees if death is within 20 years of their release. The federal government presses the states to seek recovery. Connecticut complies with federal Medicaid rules by passing and enforcing numerous collection statutes, including those giving the State priority over other claimants. ■

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