

# **Pennsylvania Association of Elder Law Attorneys**

*A State Chapter of the National Academy of Elder Law Attorneys*

P.O. Box 61051, Harrisburg, PA 17106

(717) 540-4332 www.paela.info

## **PENNSYLVANIA'S PROPOSED EXPANSION OF MEDICAID ESTATE RECOVERY IN HB 1351 (§ 1412) IS BAD LAW AND BAD PUBLIC POLICY**

**The following points summarize the response of Pennsylvania Association of Elder Law Attorneys (PAELA) to HB 1351, and specifically to the language in Section 1412 that would expand Medicaid Estate Recovery to non-probate assets. This document focuses on the harm to Pennsylvania families caused by the proposed expansion of estate recovery.**

- 1. The proposed change in the Law, permitting recovery against property held by “the entirety,” jeopardizes the “Family Home” of the elderly who suffer from long-term illnesses.**

In no other public benefit program must persons forfeit equity in their home to repay the Commonwealth or the Federal government for funds expended on their behalf.

To receive help from Medicaid, care-dependent elders and the disabled must spend down their countable assets to below \$2,400. Only then will Medicaid help them pay for long-term care costs, whether the care is provided in a nursing home or at home. Under long-standing Pennsylvania law, the family-owned home is usually exempt from the “spend down” requirement. For important family reasons, family homes are often held in some form of joint or non-probate ownership by elders and their children. It is unwise and unsettling for the Commonwealth to intrude into this family domain by expanding its claim to include such property.

The potential change in the law is especially unfair to the caregiver spouse who remains at home after the institutionalization of a spouse. Generally, these “community spouses” are women who do not have substantial pensions, have lower social security rates, and whose savings have already been diminished by Medicaid spend-down rules. Under HB 1351, the Commonwealth would now add to the woes of a surviving community spouse by imposing a lien on the home, sharply limiting the survivor’s ability to use the home-equity for her own retirement needs. It would be impossible for the community spouse to sell or mortgage the property without addressing the lien. The community spouse would be unlikely to want to maintain (much less improve the home), knowing that her efforts would largely benefit only the Commonwealth. The economics of continued homeownership would thus be made more difficult for the surviving spouse.

Expanded Estate Recovery will further jeopardize the survival of the Pennsylvania family farm. Farm land is often titled jointly with the next generation, adult children who work side-by-side with the parents with the expectation that the farm will pass onto successive generations. This may no longer be possible if a parent’s receipt of Medicaid leads to the Commonwealth taking the family farm -- another apparent impact of HB 1351’s proposed Estate Recovery expansion.

## **2. The proposed change projects minimal dollars saved through Expanded Estate Recovery.**

According to the Pennsylvania Department of Public Welfare (“DPW”), the projected savings associated with Section 1214 of HB 1351 is \$1,200,000 for fiscal year 2009, and \$2,600,000 for fiscal year 2010. (See Department of Public Welfare Report Legislative Initiatives for the Fiscal Year 2009-2010 Budget, dated February 5, 2009). Under HB 1351, the projected additional recovery from expanded estate recovery represents less than 0.0019% of the Long-Term Care expenditures in the Commonwealth (using available 2005 figures).

The projected fiscal impact does not disclose what the costs would be to support an expanded Medicaid Estate recovery system. Further, most of the money collected must be turned over to the Federal government as a condition of Pennsylvania’s participation in the Federal Medicaid program. (See HHS “Medical Estate Recovery Collections” September, 2005; Policy Brief #6).

In addition, the projected fiscal impact does not take into account the possibility that if passed this proposal may disqualify Pennsylvania from receiving the augmented Federal Medical Assistance Percentage (“FMAP”) provided for under the terms of the American Recovery and Reinvestment Act of 2009 (“ARRA”), Pub. L. No. 111-5. The ARRA is effective for a “recession adjustment period” that will run from October 1, 2008 through December 31, 2010. ARRA, § 5001. States can obtain the enhanced FMAP only if they meet specified conditions, one of which is a requirement that states and territories must maintain the “eligibility standards, methodologies, and procedures” in effect on July 1, 2008. ARRA, § 5001(f)(1)(A). The Secretary of DHHS cannot waive this provision. *Id.* at § 5001(f)(4). Changing the exemptions of property subject to estate recovery appears to be just such a prohibited change.

## **3. The proposed change would cause major title and conveyancing problems for real and personal property, and would negatively impact the traditional use of life insurance by needy survivors.**

The proposed estate recovery expansion overrides the collective common and statutory law on real estate, probate, estate and trust administration, insurance claims and debt collections. It would affect entireties property, life estates, joint ownership, trusts, insurance and “any other interest a decedent may have.”

The proposed system imposes an automatic -- but largely invisible -- lien on real property. Because the receipt of Medicaid benefits is a non-record event, conveyancers would be required to ascertain whether such benefits were received for every type of survivorship conveyance, including trusts and “any other interest”. This presents an unreasonable burden on conveyancers and would create significant uncertainty and delay in title transactions.

Further, Pennsylvania has had institutional experience with welfare liens and should recall the time (prior to 1994) where general welfare liens caused abandoned housing especially in the modest housing markets. In the past, Pennsylvania experienced the result of abandoned property after death in cases where the Medicaid lien consumed or exceeded the equity in a home. Pennsylvania took the wise step of repealing welfare liens against real estate in August of 1994.

The automatic invisible lien would also apply to life insurance policies. Insurance companies would therefore need to obtain clearance from Medicaid before paying claims to named beneficiaries. Historically, proceeds from insurance policies have been rapidly available to families to support a surviving spouse and dependent or disabled children. The potential change in the law would create a

barrier between the life insurance proceeds and surviving family members at a time when the surviving family members are most vulnerable and are most likely in dire need of those proceeds. It is unrealistic to expect DPW to efficiently handle an influx of tens of thousands of new requests for releases in a timely manner.

Once parties become aware of the lien on their jointly owned property or life insurance benefits after the death of the Medicaid recipient, there must be a fair system to address their requests for relief from the lien. The procedural provisions for administering the liens that would be required are undefined. In addition, the proposed expansion of Medicaid Estate recovery makes no provisions for a fair system for resolving such claims.

**4. The burden of expanded estate recovery disproportionately affects persons with few assets, especially unsophisticated people who do not seek (or cannot afford) legal or financial planning advice. The health and safety of older adults will be jeopardized by those who need Medicaid assistance, but decline such assistance for fear of Medicaid liens.**

Many people of modest means hold their modest property in joint names because of fear of the costs of probate. For the poor, the family home is often their only real asset. The impact of proposed expansion of estate recovery to non-probate assets such as the family home falls disproportionately on the poor and the uneducated. Poor persons and unsophisticated people, including people with less education, are often the least likely to seek legal assistance or planning advice regarding alternatives to joint ownership of property. Poor families may desperately need Medicaid to assist their aging or disabled loved ones in the home or in a care facility, but will decline Medicaid, fearing the impact of the expanded Commonwealth lien. Another likely result is that in an effort to avoid estate recovery, persons of modest means will transfer property outright to their family members without the benefit of legal advice, thereby placing themselves at risk of significant financial harm.

**5. The proposed change in the Law unfairly limits the rights of redress for affected individuals.**

The language in HB 1351 establishes a system of the “government is right until proven wrong” for its lien collection. The Bill establishes a one-sided system for redress of any disputes about the Commonwealth’s lien which fails to respect the common law or statutory principles of property law (both real estate and personal property), probate, trust and estate law. As a simple example, HB 1351 permits the Commonwealth to recover against life estates – and gives the Commonwealth the sole power to place a value on the life estate for such recovery purposes, despite the fact that life estate would appear to extinguish with the death of the Medicaid recipient.

Currently, disputes about competing claims against probate property are resolved in the Orphans’ Court or in certain instances within the DPW administrative system. HB1351 would change this balance and give all authority to DPW. Unlike eligibility determinations, which impact primarily the applicant, the impact of post-death allocations of liens is on persons who are not applying for benefits. These individuals are constitutionally entitled to a fair system of adjudication of any Commonwealth liens that are purported to affect their property interests. A court-based system of adjudication of disputes should be required for protection and allocation of property interests against claims by creditors including the Commonwealth.