



ELDER LAW

Section Newsletter



A Publication of the Pennsylvania Bar Association Elder Law Section

Message from the Chair

By *Leslie Wizelman*

The Council is engaged in the process of developing a strategic plan for the Section. The plan will provide an organized and focused approach to Section activities so as to prioritize our efforts and make the most efficient use of our limited time and resources. Council devoted its meeting at the November Committee/Section Day entirely to the consideration of the draft plan.



Leslie Wizelman

The mission of the Section is defined in the Section bylaws:

The Purpose of the Elder Law Section is to enable Pennsylvania attorneys to meet the needs of their clients through the exchange of ideas and information on substantive elder law issues. The Section also shall promote improvement in substantive law, legal education and ethical guidelines.

The Council has identified five basic strategies to achieve this mission:

1. Evaluate and influence legislation and regulations to improve the quality of life of the elder population of Pennsylvania.
2. Improve relationships between the Elder Law Bar and the Executive and Legislative branches in order to be better able to advocate on

3. Promote the improvement of the practice of Elder Law through legal education and ethical guidelines.
4. Provide litigation support for appropriate cases that will benefit the elder population of Pennsylvania and monitor pending and prospective cases.
5. Maintain and enhance the positive image of the Elder Law Bar.

As Council continues this planning process, it will identify and prioritize specific objectives for each strategy and develop action plans for each objective. We intend to identify defined tasks and roles for individual Section members who are willing to devote some time to meeting our goals.

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Message From the Chair

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All of the following Section actions of the last several months clearly fall under one or more of the above strategies:

1. Family Caregivers Support: The PBA adopted the Section recommendation that the PBA “formally support legislative and administrative efforts to provide at-home care of dependent older adults, including those with chronic dementia and to provide, where appropriate, supportive social services and financial assistance to family caregivers.” This resolution allows PBA the flexibility to support future legislative and administrative initiatives benefiting family caregivers, as well as HB 1830.

2. Penalty Divisor: The PBA adopted the Section recommendation that the Medicaid penalty divisor be revised annually to properly reflect the average private nursing home cost. The daily penalty divisor has been increased from \$222.17 to \$227.61 effective Jan. 1, 2008. It is anticipated that future changes will be implemented the first of each year.

At our November Section Meeting, DPW Secretary Estelle Richman agreed to appoint a liaison to our Section to facilitate open communications, and that DPW liaison recently was appointed.

3. DPW liaison: At our November Section Meeting, DPW Secretary Estelle Richman agreed to appoint a liaison to our Section to facilitate open communications, and that DPW liaison

recently was appointed. Please e-mail your procedural or policy concerns to Robert C. Gerhard III, rgerhard@paelderlaw.net, who will forward them to the liaison.

4. Assisted Living Regulations: Council members Alissa Halperin and Dana Breslin have been actively involved with DPW’s work group addressing this issue. Section member Jacqueline Shafer also will represent the Section on the newly formed Pennsylvania Assisted Living Consumer Alliance.

5. Long-Term Care Partnership Program: Pennsylvania received approval of its state plan amendment for the partnership program on Dec. 19, 2007, with an effective date of July 1, 2007. A “Guidance Announcement” by DPW was published on Jan. 26, 2008. Section member Tom Lilly is monitoring developments in this area.

6. Tracking legislation: Tracking the numerous bills that affect our practice in this area of the law is a huge task. We are asking individual members to agree to track relevant legislation. Please contact Sally Schoffstall at sally@schoffstallandfocht.com if you are willing to assist in this effort.

7. Improving Access to Legal Services: The Section supported the grant proposal of the Pa. SeniorLAW Center and the Department of Aging to improve access to legal services. The U.S. Administration on Aging approved the grant in October. Council member Ellen Wase is representing the Section in this project, which will include a survey of elder law attorneys to identify unmet legal needs in Pennsylvania.

8. PBA Midyear Meeting/ABA Resolution: I had the pleasure of representing the Section at the PBA Midyear Meeting in Puerto Rico. While there, I had the opportunity to network with bar leaders and members of both the state and federal judiciary. I heard only favorable remarks about the Elder Law Section. I also presented a request to the Board of Governors to support the New York State Bar Association’s recommendation to the ABA urging all levels of government entities “to develop and assess innovative long-term-care programs such as the ‘Compact for Long-Term Care’ as a reasonable and fair solution to long-term-care financing.” The Board approved the resolution and it has been adopted by the ABA.

We have planned a legislative focus for the spring Section Day, Monday, April 28, 2008, 10:00 a.m., at PBI headquarters in Mechanicsburg.

9. Section Day — Monday, April 28, 2008, 10:00 a.m.: We have planned a legislative focus for the spring Section Day at PBI headquarters in Mechanicsburg. Sen. Patricia Vance and Rep. Phyllis Mundy, legislative leaders in aging matters, have agreed to speak. Please plan on attending! I hope to see many of you there. ■

Leslie Wizelman is chair of the Elder Law Section and practices elder law in Wyalusing. She can be reached at wizelman@epix.net with questions or comments.

PBA Elder Law Section Day and Annual Meeting

Monday, April 28, 2008

**PBI Headquarters
5080 Ritter Road, Mechanicsburg
10:00 a.m.**

AGENDA

10:00 a.m.

Address by Senator Patricia Vance (R),
Chair of the Senate Aging and
Youth Committee

11:00 a.m.

Section Business meeting/Election
of Officers and Council members

12:00 Noon

Buffet lunch (included —Be sure to
include on the accompanying regis-
tration form any special dietary
requirements)

1:00 p.m.

Address by Representative Phyllis
Mundy (D), Chair of the Aging and
Older Adult Services Committee

2:00 p.m.

Adjournment

*If you plan to attend, it is important
that you return the form at right
by April 18, to assure proper
planning, including adequate
available lunch.*

Elder Law Section Day and Annual Meeting

Monday, April 28, 2008

**PBI Headquarters
5080 Ritter Road, Mechanicsburg
10:00 a.m.**

I will attend the meeting.

(Please print registration information)

Name: _____ ID No.: _____

E-mail address: _____

Address: _____

City: _____ State: _____ Zip Code: _____

Telephone: _____

**Please contact PBA if you require any special services
including any special dietary requirements.**

(This meeting is NOT the March 26, PBA Committee/Section Day Meeting)

RETURN THIS FORM NO LATER THAN APRIL 18, 2008 TO:

Meetings Department
PA Bar Association
P. O. Box 186
Harrisburg, PA 17108
Fax: (717) 238-4134

Other Upcoming PBA Events:

PBA Minority Attorney Conference

April 24 and 25, 2008
Sheraton Philadelphia
Center City Hotel

PBA On the Hill

May 5 and 6, 2008
State Capitol, Harrisburg

PBA Commission on Women in the Profession at the Susan G. Komen Race for the Cure

May 11, 2008
Philadelphia and Pittsburgh

PBA Bike Tour, "Lawyers Riding for Kids"

May 17, 2008
Carlisle

PBA Annual Meeting

June 4 - 6, 2008
Hershey Lodge

PBA YLD Summer Meeting/ New Admittee Conference

July 25 - 27, 2008
Seven Springs Resort

Visit www.pabar.org for details.

Invitation to Join the Newly Created State Chapter of the National Academy of Elder Law Attorneys

The Pennsylvania Association of Elder Law Attorneys (PAELA) is a newly created state chapter of the National Academy of Elder Law Attorneys (NAELA). It is not intended to duplicate or replace the Pennsylvania Bar Association's Elder Law Section. Rather, it is intended to supplement the work done by the Section and increase our education, communication and advocacy options. While PAELA is legally unrelated to the PBA, the incorporators of PAELA are members of the Elder Law Section Council and remain committed to the PBA.

PAELA should allow Pennsylvania elder law attorneys to act more quickly and forcefully and communicate more effectively in support of our members and our clients. It will provide us with the support of a national organization, while allowing us the independence to react promptly to regulatory actions and to advocate on matters of public policy. The ability to react promptly has already been put to use. On short notice, PAELA was able to provide comments to the Department of Public Welfare on the Pennsylvania Aging Waiver (Home and Community-Based Services Waiver of Individuals Age 60 and Over) renewal. The details of our comments can be found in the article on Page 10 in this newsletter by Jeffrey Marshall, CELA.

Members will be able to participate on the PAELA listserv and to attend our meetings and educational programs. It should enhance our ability to meet the needs of our practices and our clients while promoting improvements in the laws affecting those we serve.

As a state chapter of the National Academy, PAELA is only open to attorneys who are also members of NAELA. Membership applications can be obtained by contacting NAELA at (520) 881-4005 or www.naela.org.

Please feel free to contact Marielle Hazen, PAELA president, at mhazen@hazenelderlaw.com or (717) 540-4332 if you have questions. The members of the PAELA Board of Directors look forward to having you join us!

The Pennsylvania Association of Elder Law Attorneys Board of Directors:

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 Robert Clofine, Vice President
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Status of Assisted Living in Pennsylvania

By Dana M. Breslin

As a follow up to Act 56 of 2007 (SB 704), which sets the stage for licensing of assisted care facilities in Pennsylvania, the Department of Public Welfare formed a study group comprised of consumer representatives and provider representatives to assist in writing the regulations for assisted living. Since Act 56 left most of the detail to "regulations to be promulgated by DPW," these regulations will be extremely important for establishing the minimum standards for assisted living.

The Elder Law Bar has two representatives on the study group, Alissa Halperin and myself. The meetings, while tedious, have been enlightening. The timeline is very short. DPW plans to issue proposed regulations in May 2008, followed by the regulatory comment period and for referral to the Pa. Independent Regulatory Review Commission. DPW plans to submit the final regs to the IRRC and standing committees of the Legislature in October 2008, and final regs are to be published in the *Pennsylvania Bulletin* in January 2009.

DPW will also be submitting a request to CMS for assisted living waiver, which opens the door for Medical Assistance funding of assisted living. This will not happen overnight but DPW hopes everything will be in place in 2009.

Keep your eyes open for the *Pennsylvania Bulletin* as well as the listserv for further updates. ■

Dana M. Breslin is certified as an Elder Law Attorney by the National Elder Law Foundation. She practices with Pappano & Breslin, Brookhaven, (610) 876-2529.

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Residency and Spousal Impoverishment Protections

By Robert R. DeLong Jr.

When many of us meet with families and seniors coping with increasing health care costs and diminishing assets, how often do we examine which state residence might be best for the particular client given the financial circumstances? Is it appropriate that we as planners might potentially add to a senior's worries by discussing the option of relocating to another venue for Medicaid planning purposes?

As an attorney licensed and actively practicing only in Pennsylvania, I readily admit that I rarely consider other jurisdictions as a potential residence for the older family member. First, while I am licensed in New Jersey, I only provide formal advice regarding Pennsylvania law. Additionally, when, in the totality of the circumstances, all family members (or at least those most active in support for the elder client) reside in Pennsylvania and there are no significant ties to another jurisdiction, the choice of venue may already be settled.

I was born, was raised and have lived most of my life in Delaware County, Pennsylvania. As the county name suggests, my county is contiguous to the state of Delaware (also Philadelphia, Montgomery and Chester counties. In "Delco," we are just across the Delaware River from New Jersey — only an hour or so from the Jersey shore. Despite the fact that many locals travel to Delaware to buy alcoholic beverages (Delaware does not have "state stores") and home appliances (Delaware imposes no sales tax); most of my clients are steadfast Pa. residents. Even the locals who unfailingly go "down the shore" (translation: summer vacation on one of the beautiful New Jersey beaches) still return home to Pennsylvania. Most would not normally consider

moving anywhere else — let alone a move east across the river. Besides, locals (like me) were raised with a local pride and the sensible belief that in all things, Pennsylvania is "better" than New Jersey. For example, the old saw was that in New Jersey, "no one really knows how to drive." (Was this belief because the southern part of the state is predominantly flat and the roads so straight — with traffic circles? No adult ever explained this and similar predispositions.)

Shall we gather at the river?

Some years ago, one of my favorite uncles, Uncle Harry — a true member of the greatest generation having seen combat as a paratrooper in Europe in WWII — was starting to go downhill. Then already in his 90s, Harry had always been a physically fit man who reveled in being active and participating in outdoor activities. Harry had lived for many years with his sister Ruth and her husband, Hank. Although Aunt Ruth had sadly passed away in the 1990s, Harry and Hank continued to live together in Hank's home.

Harry's particular pattern of aging was notable not in any lack of mobility, but rather as increasing forgetfulness. This tendency gradually increased and developed into chronic and increasingly debilitating dementia. Whether Alzheimer's or vascular dementia, the consequence was the same — increased restlessness and inability to cope with the activities of daily living that most of us take for granted.

Then one day Harry, who had not driven an automobile in years, found his car keys and went for an unescorted drive. He was missing for almost a full day. Fortunately, the Philadelphia police found Harry only 15 miles from home. He was still in his car. He was very scared and hungry, but thankfully

neither he nor anyone else was harmed. Sadly, it now was time for the family to find an alternative residence for this aging warrior.

Fortunately, another uncle, Harry's brother Walter, was then getting ready to move with his wife into a cottage in a continuing care retirement community in Salem County, New Jersey. Harry had the opportunity to become the first resident of the CCRC's new assisted living facility. Long before Harry's disease had progressed, we had executed Powers of Attorney for financial and health care decisions. Harry had named Walter as his first agent, with Hank as his backup, so the family was well enabled to contract for these new arrangements.

For me, the first aspect in a decision as to whether or not a senior might reside in a facility is always to consider whether or not the rest of the family will be able to visit.

For me, the first aspect in a decision as to whether or not a senior might reside in a facility is always to consider whether or not the rest of the family will be able to visit. Here, even though Hank would have to drive across the bridge, he was only about 30 minutes door-to-door (and Hank loves to drive — anywhere — anytime). Walter was not as mobile, but because Harry would now be only a short walk (or scooter ride) away, he could now visit with him on a daily basis.

The next question was how Harry's finances would stand up to the burden of the (approximately) \$5,000 per-month expense. Fortunately, while Harry owned no home, he had a number

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Residency and Spousal Impoverishment Protections

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of securities investments. In fact, on a straight-line analysis, unless Harry lived long enough to have Willard Scott place his picture on a Smucker's jar, his money would not run short.

The next step was to consider whether or not to make this change permanent — to change Harry's residency to New Jersey. Harry was a bachelor and life-long Pennsylvania resident. As Harry's scrivener attorney, I knew that he had divided his estate equally between his brother Walter and his brother-in-law Hank. Harry's Will instructed that his estate was to pay any inheritance tax due and the resulting net distribution to his two heirs was to be as equal as possible. Thus I could predict that should Harry die as a resident of Pennsylvania, the "sibling" portion of the estate would be subject to a 12 percent levy and 15 percent for the balance.

The more fun part of the analysis for this parochial Pennsylvanian was the analysis of the inheritance and income tax circumstances should Harry become a New Jersey resident.

Garden State Savings Harvest

The more fun part of the analysis for this parochial Pennsylvanian was the analysis of the inheritance and income tax circumstances should Harry become a New Jersey resident. To their credit, agents Walter and Hank never indicated any concern about the inheritance aspect of my analysis. Nonetheless, I discovered that New Jersey's rate of inheritance tax would be, in these circumstances, slightly lower. (While New Jersey terminology is distinctive, the sibling rate is 0 percent for the first

\$25,000 and then 11 percent of the balance up to \$1,075,000 — inheritance to collateral heirs is subject to a 15 percent tax, just like it is Pennsylvania.)

Naturally, the increased health care expenses associated with care for dementia at an assisted living facility would mean that Harry's days of paying federal income taxes on his dividends and savings interest were essentially over (provided we took care to manage his modest investments and realize any net long-term capital gains over various tax years).

For my uncles, the more intriguing aspect was the impact of the change at a state income tax level.

For my uncles, the more intriguing aspect was the impact of the change at a state income tax level. New Jersey has a graduated income tax and the effective rate of personal income tax can rather quickly become greater than Pennsylvania's flat 3.07 percent. However, unlike Pennsylvania, but akin to the federal income tax system, New Jersey permits the itemized deduction of health care expenses. Now, as a New Jersey resident and living in an ALF, Harry would owe neither federal nor state income tax. Although Harry had been a lifelong Pennsylvanian, it simply made sense to change his residency concurrent with his physical relocation to the New Jersey facility and to file his taxes as a new resident of that state.

Happily, as is so often the case, Harry's move to the New Jersey assisted living facility yielded other, truly more significant, benefits. Harry received daily trained medical care and attention. Harry's overall aspect — grooming, general health and weight — improved within weeks and he had a number of good years in his new, New Jersey home. Uncle Hank, who had

been Harry's primary caretaker, enjoyed his frequent jaunts over the Commodore Barry Bridge to visit, but he certainly enjoyed a more carefree existence without the obligations associated with Harry's daily care. And brothers Walter and Harry enjoyed their new found proximity to rekindle their fraternal bonds.

... there are at least 11 states that permit the well spouse to hold 100 percent of the couple's available resources ... some of these localities boast locations where ... even diehard Pennsylvanians ... might readily choose to retire and very happily live.

Does it get better than this?

It could ...

An Enhanced CSRA? Pennsylvania's minimum community spouse resource figure is currently \$20,880. However, there are at least 11 states that permit the well spouse to hold 100 percent of the couple's available resources, subject only to the \$104,400 cap of the maximum community spouse resource allowance. And some of these localities boast locations where many people — even diehard Pennsylvanians — might readily choose to retire and very happily live. States that currently permit the "enhanced" \$104,400 cap include Alaska, California, Florida, Georgia, Hawaii, Illinois, Louisiana, Massachusetts, Maine, Mississippi and Vermont.

For some, Alaska might be too far or Vermont too cold, but sunny Florida and tropical Hawaii sound pretty pleasant for an otherwise stressed-out community spouse. Obviously, an "enhanced" CSRA

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Residency and Spousal Impoverishment Protections

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is only one pecuniary aspect of a more-involved analysis, but it is interesting to bear in mind nevertheless. OK, what about other aspects that should be part of basic multi-state Medicaid analysis?

Rancho Grande? (Enhanced Home Equity Maximum). Pursuant to the Deficit Reduction Act of 2005 (DRA), limits were placed on Medicaid applicants with substantial home equity. Some states have opted to cap the home equity at \$500,000, while other states have allowed the maximum home equity limit set forth in the DRA of \$750,000. These Enhanced Home Equity states, that I'll call "Rancho Grande" states for fun, include Connecticut, Maine, Massachusetts, New Jersey and New York.

Hmm, New Jersey is starting to look more intriguing all the time. And, New Jersey Medicaid can even pay for assisted living facilities in some cases — something that Pa. has announced it is striving for, but does not yet formally offer. So, should the elder have a home "down the shore," a relocation to "Jersey" might be worth investigating.

So, should the elder have a home "down the shore," a relocation to "Jersey" might be worth investigating.

Enhanced Minimum CSRA. Many of us have tried to help couples whose joint available resources do not even tally as much as \$104,400. Recognizing that home maintenance and other similar larger lump some costs, or predictable expenses require a reasonable nest-egg of cash, many states permit an enhanced minimum above the current federal base of \$20,880. The states and their minimum CSRAs are set forth below:

New York	\$74,820;
New Mexico	\$31,290;
Oklahoma	\$25,000;
Washington	\$41,943;
Wisconsin	\$50,000;
South Carolina	\$66,840
(but this is also the South Carolina Maximum CSRA!)	

Read the fine print please.

As we know from life and practice, the devil is in the details. For example, New York, recognizing that the cost of skilled care is much more costly in the metro New York City area than other parts of the state and New York State recognizes a number of "regions." Each New York state Medicaid Region has its own penalty divisor that ranges from a high of \$10,555 per month in Long Island to a "low" of \$7,066 per month in the western part of the state.

Another caution: establishing legal residency takes time and planning.

Another caution: establishing legal residency takes time and planning. Often, a number of legally significant steps: voter registration, primary mailing address, situs from which you file your taxes and the like. Each of these residency establishing acts takes time and effort. Consider for example that our own Pennsylvania PACE and PACENET require a minimum of 90 days Pa. residency for a successful application. Not only must the elder and his personal effects be relocated, but you must ensure that you have created a proper trail of residency indicia for the new state.

Final caution: most of the figures cited in this "research light" article are the result of a quick, Web-based investigation (with particular appreciation to Harry Margolis' excellent Web site:

www.elderlawanswers.com). Many states are still coming to grips with the DRA. Additionally, as recent history has taught too well, a state can change its policies rather suddenly, and long after a client's Medicaid plan has begun.

And of course, there is much more to quality of life than the state in which one lives. Sure, California has sun, beaches and beautiful mountains, but also dramatic fires that consume neighborhoods — not to mention frequent earthquakes and community property. Likewise, Florida is lovely, but also home to alligators and hurricanes. Alaska gets a bit chilly come winter, and is a long commute for the rest of the family. Hawaii is gorgeous, but there are very high costs for almost everything except pineapples (it is an island), very high housing prices and then there are the volcanoes — you know, "molten lava."

Still, as we sit in the snow and cuss the accuracy of our own Punxsutawney Phil, it sort of makes you think that there could be better places for us or our elder clients to live. This can be particularly true when we consider tax and Medicaid planning issues for individuals facing the need for long-term care. ■

Robert R. DeLong Jr. is a Pennsylvania elder law attorney with offices in Media, Delaware County. He can be reached at robertdelongesq@hotmail.com with questions and comments.

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Elder Law Numbers Quick Reference

By *Robert C. Gerhard III*



		EFFECTIVE DATE
Personal Needs Allowance	\$45	July 1, 2007
MNO-MA Resource Limit	\$2,400	
NMP-MA and PDA Waiver Resource Limit	\$2,000 plus \$6,000 disregard	
NMP-MA and PDA Waiver Program Income Limit	\$1,911	January 1, 2008
Home Maintenance Allowance	\$664.40 (6-month limit)	January 1, 2008
Minimum Community Spouse Resource Allowance	\$20,880	January 1, 2008
Maximum Community Spouse Resource Allowance	\$104,400	January 1, 2008
Minimum Monthly Maintenance Needs Allowance	\$1,712	July 1, 2007
Maximum Monthly Maintenance Needs Allowance	\$2,610	January 1, 2008
Shelter Standard	\$514	July 1, 2007
Utility Monthly Allowances		October 1, 2007
Utility Allowance, including heat:	\$466	
Utility Allowance, non-heating	\$248	
Utility Allowance, phone only	\$31	
Medicare SNF Co-insurance amount	\$128/day	January 1, 2007
Pa. Average Daily Cost of Nursing Facility Care (Medicaid Penalty Divisor)	\$227.61	effective for applications on or after January 1, 2008

Robert C. Gerhard III limits his Montgomery County practice to elder law matters, primarily asset protection from long-term-care costs. He is author of Pennsylvania Medicaid, Long-Term Care and Pennsylvania Medical Lawsource, published by the George T. Bisel Company, and can be contacted at www.paelderlaw.net with comments or questions.

Elder Law Section

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Jeffrey Marshall Receives Excellence in Elder Law Award from Leslie Wizelman

PBA Elder Law Section Chair Leslie Wizelman had the honor of presenting the 2007 "Excellence in Elder Law Award" to Jeffrey Marshall. Jeff is the founder and now managing attorney of the elder law firm of Marshall, Parker & Associates with offices in Williamsport, Jersey Shore, Wilkes-Barre and Scranton. He is a Certified Elder Law Attorney, and has been a member of NAELA since 1988. He is past chair of the PBA Elder Law Section and currently serves on the Section Council.

If you read his article in this edition of the newsletter, you will agree that he has never stopped being a student of the law. His book, *Elder Law in Pennsylvania*, was recently published by PBI press. What you also should know is that his work in elder law extends far beyond academics. Jeff is a tireless advocate in the development of Pennsylvania's elder law. He has worked diligently over



the years to impact the legislative and regulatory process and has helped shape elder law in Pennsylvania. The PBA Elder Law Section proudly salutes Jeff for his commitment to excellence in elder law. ■

Renewal of the PDA Over-60 Waiver

By Jeffrey A. Marshall, CELA

Introduction

Pennsylvania's Department of Aging Over-60 Waiver program (PDA Waiver) provides important financial support for thousands of seniors. The program's fundamental goal is to limit nursing facility utilization and maintain elderly persons in the community for as long as possible. This year, the program will help approximately 13,000 seniors over age 60 meet their long-term-care needs at home.

As a Medicaid program, the PDA Waiver receives federal funding based on the Pennsylvania federal participation percentage.¹ In order to obtain these federal matching funds, the program must be approved by the Centers for Medicare and Medicaid Services (CMS).² Once granted, this approval must be renewed every five years. Pennsylvania's PDA Waiver was last renewed in 2003. The current five-year term will expire on June 30, 2008. Pennsylvania is preparing to apply for another five years of federal funding.

As part of the re-application process, the Office of Long-Term Living recently solicited oral and written comments at "Listening Sessions" held in various locations across the state. The newly formed state chapter of the National Academy of Elder Law Attorneys submitted comments, which are reproduced [at the end of this article].

The PDA Waiver is faced with many challenges as it enters its next renewal term. We should expect that the program will undergo significant alterations. These changes will affect the program's consumers, providers and case managers.

This article is intended to help the reader gain additional understanding of the PDA Waiver program and some of the problems and pressures affecting it

during this period of renewal and transition.

What is a Home- and Community-Based Services Waiver?

The Medicaid program was created in 1965 as Title XIX of the Social Security Act.³ It replaced two earlier programs that provided federal grants for medical care for welfare recipients and the aged.⁴ Under Medicaid, the federal government provides open-ended matching funds for expenditures made by the states in accordance with federal requirements.

Initially, federal Medicaid matching funds were limited to primary- and acute-care services. In 1968, nursing facility and other forms of institutional long-term care were added. The program has since become the major government source of funding for long-term-care services.⁵ It is the ultimate safety net for seniors who become impoverished meeting their long-term-care needs.⁶

In 1981, Congress enacted Section 1915(c) of the Social Security Act, which authorized the creation of Home and Community-based Services (HCBS) Waiver programs.⁷ Section 1915(c) provides states with a Medicaid-financed alternative to institution-based care. Congress recognized that many individuals who would otherwise be institutionalized could be cared for in their own homes and communities at a cost no higher than that of institutional care.⁸ In the intervening years, every state has utilized Medicaid HCBS funding to cover a range of services and supports needed by people to live independently in the community.



Jeffrey A. Marshall

HCBS waivers under Section 1915(c) make federal funds available for services that are outside the state Medicaid plan. Waiver services can be similar to, but must not duplicate services which are provided under the state Medicaid plan.⁹ The state must demonstrate that the cost of waiver services is not more than the cost of providing these recipients with hospital, nursing facility, or ICF/MR services that would be reimbursed under the state Medicaid plan.

Section 1915(c) gives states wide latitude to design waivers to serve specific target populations. Waivers allow states, with the approval of the Secretary of HHS, to implement programs that do not comply with otherwise mandatory federal Medicaid requirements.¹⁰ Thus, states may restrict waiver services to certain age groups, or to people with certain kinds of disabilities, or to people residing in a specific geographic region. In addition, Section 1915(c) waivers can authorize states to adopt strategies to limit the use and cost of services in ways (such as capping available slots) that would otherwise violate Medicaid standards.¹¹

Under a waiver, states may obtain federal funding to provide a wide variety of medical, non-medical, social and supportive services not usually provided under traditional Medicaid. Section 1915(c) thus allows states to become laboratories for experiments in delivering innovative services in a cost-effective manner.¹²

Re-balancing Public-Funded Long-Term Care

The public funding of long-term-care services delivered in the recipient's home has been steadily increasing. Nationally, the proportion of Medicaid spending on HCBS more than doubled

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Renewal of the PDA Over-60 Waiver

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from 1992 to 2004.¹³

The 2008-09 Governor's Executive Budget promotes "home- and community-based care as a cost-effective alternative to nursing facility care with particular emphasis on transitioning nursing home residents wishing to leave a facility-based care setting and return to their home or community."¹⁴ In addition to cost savings, increasing the availability of home- and community-based care is seen to "promote independence and self-reliance, and maximize opportunities for family and community involvement."¹⁵

Although more long-term-care services are being delivered in the home, Medicaid funding has remained predisposed toward institutional care. Policymakers and advocates agree that "[f]ar too often, persons needing long-term care receive it in a nursing home because of inadequate public funding for long-term-care services in the community."¹⁶ For the consumer in need of care, federal and state policies often continue to favor the choice of institutional care over services in home- and community-based settings. In addition, non-Medicaid factors such as the lack of appropriate housing options, transportation and workforce issues, and caregiver burden and stress, can push the consumer to choose institutional care.¹⁷

This structural bias continues despite evidence that financing care in the home or community costs less on average than nursing facility care. In Pennsylvania, the current average monthly per capita cost of PDA Waiver services is only \$1,709, while the average monthly cost to Medicaid of nursing home care is \$4,321.19. Nevertheless, over 70 percent of older Pennsylvania Medicaid recipients continue to have their long-term-care needs met in an institutional setting.¹⁹

Budget concerns, consumer preferences, and the 1999 United States Supreme Court *Olmstead* decision,²⁰ which held that unnecessary institutionalization constitutes illegal discrimination based on disability, have all given impetus to state and national efforts to rebalance the system so that more long-term care is delivered in non-institutional settings. Overcoming Medicaid's institutional bias and rebalancing the system to approach a 50/50 split between institutional and HCBS funding is the stated goal of the Rendell Administration.²¹ Renewal of the PDA Waiver is one of a number of initiatives intended to foster this realignment.

Pennsylvania's Department of Aging Waiver

Pennsylvania provides a continuum of support services to allow frail seniors to remain in or return to their homes and avoid an institutional setting.²² Services based "on the functional and financial qualifications of the consumer [range] from home-delivered meals to intensive in-home services for older Pennsylvanians needing the level of care available in institutional settings."²³ Services for individuals who are not eligible for Medicaid are funded through other revenue sources such as the lottery and state general revenues. Persons with higher income or assets may be required to share in the cost of services.

The PDA Waiver is a HCBS waiver under Section 1915(c) of the Social Security Act. It authorizes Pennsylvania to receive federal Medicaid matching funds to provide home- and community-based services to persons age 60 and older. To qualify, individuals must be financially and clinically eligible for Medicaid nursing facility services and be able to be appropriately served in their own homes or in other community living arrangements.²⁴

Pennsylvania's PDA Waiver was last renewed by the Centers for Medicare & Medicaid Services (CMS) for a five-year period that ends on June 30, 2008. A renewal application is being submitted to seek funding for another five-year term.

In the past, the Department of Public Welfare had overall responsibility for operating the PDA Waiver. The Waiver is currently overseen by the Office of Long Term Living, the recently created joint office of the Pennsylvania Departments of Public Welfare and Aging.

Financial eligibility is determined by local county assistance offices. Waiver operational and administrative functions, including determination of clinical eligibility, have historically been performed at the local level by Area Agencies on Aging (AAAs).

The Pennsylvania Department of Aging has operational and administrative responsibilities including oversight of local AAAs. It develops policies and procedures for the program. Some of these can be accessed through the Department's Web site: www.aging.state.pa/aging. The Web site includes the Home and Community Based Services (HCBS) Procedures Manual, which is intended to be a comprehensive guide to program procedures. Online materials are, however, frequently incomplete or out-of-date.

Through the PDA Waiver, recipients may receive a wide array of approved services with some consumer choice as to providers. Services include "home health and personal care services, home support, attendant care, respite care, adult day care, transportation, home modifications, specialized medical equipment and supplies, counseling, extended state plan physician services, home-delivered meals, personal emergency response, and compan-

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ions.”²⁵ Case management and service coordination has traditionally been provided by the local AAAs, although this role may change under new federal rules discussed below.

According to a Pennsylvania report to CMS, the PDA Waiver served 14,754 individuals during fiscal 2004.²⁶ Reflecting the program’s growth, the 2008-09 Governor’s Executive Budget estimates that 23,111 recipients over age 60 will receive PDA Waiver services at an average per capita monthly cost of \$1,741.²⁷

Program Problems and Concerns

Despite the general consensus among consumers and policy-makers in support of expanding home-based services, the PDA Waiver program faces numerous challenges as it enters its next five years.

1. Meeting Federal Requirements

A. CMS Report

During the past year, the federal government reviewed Pennsylvania’s operation of the PDA waiver.²⁸ CMS found that Pennsylvania had improperly made modifications to program operations in the area of Level of Care (LOC) and intake procedures without federal approval.²⁹ In addition, CMS found that Pennsylvania lacks a uniform, state-wide, rate-setting methodology. These issues, and other concerns and suggestions raised in the CMS report, will have to be addressed in the renewal application.³⁰

B. Targeted Case Management Interim Rules

New regulations issued by CMS have the potential to force extensive reconstruction of the operation and administration of the PDA Waiver. Unless blocked by Congress, the Interim Targeted Case Management Rule is set to take effect on March 3, 2008.

Case management helps individuals gain access to needed medical and support services. The term “targeted case management services” means case management services that are provided to targeted populations without regard to state-wideness and comparability requirements.

The Deficit Reduction Act of 2005 (DRA) re-wrote Medicaid’s definition of case management and placed new limits on the services that are reimbursable. The Interim Rule³¹ was issued by CMS under authority of Section 6052 of the DRA.³² However, CMS’ implementation of the DRA as set forth in the Interim Rule is being criticized as going well beyond Congressional intent.

Pennsylvania currently receives Medicaid funding for case management services provided by local AAAs in regard to Waiver services. The state is able to use 180 days of case management services to help transition Medicaid beneficiaries from nursing facilities to home- and community-based-care.

Changes mandated by the Interim Rule would greatly reduce Pennsylvania’s receipt of federal matching funds for Waiver-related case management services.

These changes include:

- Reduction of the 180 days of case management coverage to a maximum of 60 days (and even less for short stays in an institution). And Medicaid reimbursement will not be available unless and until an individual successfully transitions to the community.
- Imposition of a fixed limit of one case manager per person, without regard to the multitude of conditions that may affect an individual. That single case manager will have to attempt to manage services across complex morbidities and service systems.
- Limitation of prior state flexibility in payment methodologies. The Interim Rule requires states to follow a payment

determination rate familiar to lawyers — based on 15 minute increments.

- Opening case management to competition. In Pennsylvania, case management for the PDA Waiver is reimbursed as an administrative activity with the local Area Agencies on Aging (AAAs) serving as the required case management provider. Level of care determinations are made by the AAA case managers with oversight by the Pa. Department of Aging. Under the Interim Rule, consumers must be offered a choice of case managers (and may even choose to have no case manager). In addition, case managers will no longer be permitted to make level-of-care determinations.

These changes, if implemented, will force Pennsylvania to dramatically restructure the way the PDA Waiver is administered. The Department of Public Welfare, the Pennsylvania Association of Area Agencies on Aging, home care providers and elder law attorneys have all raised concerns that the Interim Rule will have serious negative consequences for the delivery of services under the PDA Waiver and other programs. Strong opposition has also been expressed by other state and national organizations and the National Governor’s Association.³³

DPW has requested that CMS delay the implementation of the new rule. The National Governor’s Association has asked Congress to step in to prevent the imposition of the new Rule. Congress has imposed moratoriums on other recent Bush Administration attempts to pursue substantive changes like these via regulation, and delay is quite possible.

2. State Imposed Restructuring

A. Thomson Medstat Reports

In July 2005, DPW contracted with Thomson Medstat, the world’s largest professional healthcare information serv-

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ices provider, to evaluate Pennsylvania's long-term-living programs, and to suggest ways to better manage cost and quality. Special emphasis was placed on the structure of the state's Medicaid home- and community-based services (HCBS) waiver programs.

At approximately the same time, CMS engaged Thomson Medstat to develop a technical assistance guide that all states could use to create a profile of their long-term-care systems. Pennsylvania was chosen as the research subject in developing the guide.

As a result of these endeavors, Thomson Medstat issued two important reports on the Pennsylvania long-term-care system.³⁴ A March 2006 report titled, "Home and Community Based Services Reform and Rebalancing Feasibility Analysis Final Report," recommended that the state consider a number of structural changes to Pennsylvania's existing system of delivering home- and community-based services. These recommendations appear to sketch many of the actions being pursued by the Office of Long Term Living.

The Thomson Medstat findings and recommendations for Pennsylvania's waiver programs (not limited to the PDA Waiver) included:³⁵

1. Realignment of management structures to link management authority and fiscal responsibility.
2. Centralized administration of waiver programs and strengthened state oversight of local waiver program operations and quality monitoring activities.
3. Development of a uniform assessment process.
4. Streamlining the eligibility process for applicants at most risk of institutional services.
5. Prioritization of waiver services for persons most at risk.
6. Development of residential service

components in waiver programs.

7. Increased continuity in case management services.
8. Separation of case management services from direct service provision.
9. Consolidation of several waiver programs (not including the PDA Waiver).
10. Broadening waivers to serve additional population targets.

B. Assessments and Level of Care

In order to qualify for PDA Waiver benefits, an applicant must be determined to require the level of care of a nursing facility.³⁶ This determination is based on a medical evaluation conducted by the applicant's physician and an assessment conducted by the local area agency on aging. The level-of-care (LOC) criteria are complex, involving multiple measures of functional and nursing needs.

In 2006, the Department of Aging revised the assessment process in order to enhance statewide "consistency" in assessments and increase centralized control over the availability and utilization of Waiver. It issued a new standardized tool for assessing clinical eligibility for Medicaid-funded nursing facility and waiver services.³⁷ In addition, the Department revised and tightened the criteria for functional qualification for Medicaid. These changes effectively limited eligibility for Waiver benefits, resulted in frequent delays in approvals and made planning much more difficult.

As discussed below, the Department's new functional need criteria appear to be in contravention of federal Medicaid law.³⁸ In addition, the assessment and level-of-care changes were implemented without being submitted to CMS for approval.

Prior to the 2006 changes, the Department of Aging Assessment

Manual mirrored federal law by specifying that functional eligibility for the Waiver requires a medical diagnosis/illness or condition, which creates medical needs for care and service, which:

- Are ordered by, and provided under the direction of a physician, and;
- Are needed to be given on a regular basis and provided by or under the supervision of a skilled medical professional, *or*
- Because of a mental or physical disability, the individual requires nursing and related health and medical services in the context of a planned program of health care and management.
- These services are usually only available in an institutional setting. [Emphasis added]

The Department's above stated pre-2006 definition of nursing facility clinical eligible (NFCE) status was consistent with federal Medicaid requirements that eligibility be granted not only to consumers who need "skilled care" but also to applicants in need of what used to be called "intermediate care."³⁹

On March 28, 2007, the Department of Aging formally revised the Home and Community Based Services Assessment Manual with the issuance of Aging Program Directive APD #07-01-01.⁴⁰ The APD re-defined an NFCE consumer as follows:

A NFCE consumer is an individual who is assessed and determined to be clinically eligible for NF care. This determination is made based on the diagnosis by a physician of a medical illness or condition which creates medical needs that require care and service, which:

- Are ordered by, and provided under the direction of a physician, and;
- Are needed to be given on a regular basis and provided by or under the

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supervision of a skilled medical professional, and

- Because of a mental or physical disability, the individual requires nursing and related health and medical services in the context of a planned program of health care and management.
- These services are usually only available in an institutional setting. [Emphasis added]

The change of the word “or” to “and” imposes a skilled care requirement for NFCE status and effectively deletes coverage for consumers who need only an intermediate level of care. As a result, the Department has set the standard for eligibility higher than federal law permits in violation of Section 42 U.S.C. § 1396r(a).⁴¹

Pennsylvania’s current non-compliance with federal level-of-care requirements will need to be addressed in the Waiver renewal.

3. Quality Concerns

Seniors who are nursing home clinically eligible are a particularly vulnerable population. As we redirect public funding from institutional care to home-based care, a primary concern should be the quality and safety of community delivered services.

For decades, Medicare- and Medicaid-funded nursing facilities have been subject to stringent regulations and surveys intended to help ensure the delivery of quality care. But similarly rigorous quality assurance standards and enforcement mechanisms do not yet exist with regard to the services delivered in homes under PDA waiver. To some extent, the home setting precludes the level of oversight found in nursing facilities. Quality problems such as lack of reliability, negligent or untimely care, poor attitudes, theft, neglect, and abuse

may be much more difficult to discover in the home environment.

A 2003 U.S. Government Accountability Office (GAO) report found significant quality problems in many Medicaid HCBS waiver programs.⁴² Common problems included:

- Clinical staff with inappropriate credentials or training to provide care;
- Case managers who were under-qualified and inexperienced;
- Authorized or necessary services that were not provided;
- Plans of care that did not include adequate assessment or documentation of the recipient’s care needs;
- Medication administration which was not sufficiently documented in records, raising concerns that medication was not dispensed safely or by qualified staff in some programs, and
- Insufficient available staff.

After the issuance of the GAO report, CMS increased its focus on state waiver program quality-assurance systems; and, in the DRA, Congress ordered the development of quality-of-care measures that can be used to assess Medicaid HCBS programs. The goal is development of the ability to perform comprehensive, standardized assessments of quality of care in Medicaid home- and community-based services. A related endeavor is the creation of a combined patient assessment instrument that can be used across institutional and home care settings.⁴³

In its October 2007 Pennsylvania report, CMS found that “[w]hile the state does engage in discovery activities designed to monitor Waiver program quality within individual provider agencies, there is not currently a strategy to analyze the results in aggregate form, or develop systemic remediation strategies to improve overall Waiver program quality.”⁴⁴ In addition, CMS noted that

Pennsylvania needs to improve its system of assuring the health and welfare of Waiver participants including identification, remediation and prevention of abuse, neglect and exploitation.

As part of the renewal application, Pennsylvania will be required to address these CMS concerns and develop a comprehensive strategy to improve overall Waiver program quality. While Pennsylvania will be working on systemic improvements in quality assurance, the task of developing a system that can comprehensively evaluate and monitor the quality of care being delivered to PDA Waiver recipients in their homes is formidable.

4. Barriers to Expansion

For numerous reasons, access to Medicaid coverage for PDA Waiver services is more difficult and restricted than access to nursing home care. Impediments to more effective consumer utilization of waiver services is documented in a report originally prepared by a workgroup of the Pennsylvania Intra-Governmental Council on Long Term Care in 2002, and revised in 2008.

“The Workgroup found approximately 22 barriers that relate to lack of information and knowledge about HCBS, the stigma attached to receiving publicly funded HCBS, complexities and delays in establishing functional and financial eligibility for publicly funded HCBS, insufficient services for certain geographic or functional populations, unavailability of affordable housing, shortages in the workforce, and lack of quality assurance.”⁴⁵

If the state’s desired re-balancing is to succeed, it will need to more effectively address the informational, procedural, and systemic barriers described in the Workgroup report.

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Conclusion

For the foreseeable future, Medicaid will remain the primary public financing system for long-term services and supports. The trend toward providing more of those services in the home will continue. Cost concerns will dominate policy decisions made in regard to home care expansion, but many other issues need to be addressed if we are to create a system that will provide cost-effective high-quality home and community services to our vulnerable seniors. Cost, access and quality will remain key areas of concern. ■

¹ Financing for Medicaid is shared by the federal government and states and is based on the Federal Medical Assistance Percentage (FMAP), which relies on the state's relative per capita income. For fiscal year 2008 Pa.'s standard FMAP is 54.08 percent. In 2009 Pa.'s federal match will increase to 54.52 percent.

² CMS acts on behalf of the secretary of Health and Human Services.

³ Title XIX appears in the United States Code as §§1396-1396v, subchapter XIX, chapter 7, Title 42. Regulations relating to Title XIX are contained in chapter IV, Title 42, and subtitle A, Title 45, Code of Federal Regulations.

⁴ "Green Book: Background Material And Data On The Programs Within The Jurisdiction Of The Committee On Ways And Means," Committee On Ways And Means, U.S. House Of Representatives, 2004.

⁵ Unpaid caregiving by family and friends is the primary source of long-term-care services for individuals who live at home. The annual value of this uncompensated care has been estimated to be in excess of \$250 billion per year. See, *Marshall, Elder Law in Pennsylvania, 2nd Edition* at 370.

⁶ See, "Medicaid Home and Community-Based Service Programs:

Data Update, December 2007" *Kaiser Commission on Medicaid and the Uninsured*.

⁷ 42 U.S.C. § 1396n(c)(1); see 42 C.F.R. § 441.300 (the federal act "permits states to offer, under a waiver of statutory requirements, an array of home- and community-based services that an individual needs to avoid institutionalization").

⁸ See, *Marshall, Elder Law in Pennsylvania, 2nd Edition*, Section 12-1.4

⁹ CMS, *State Medicaid Manual*, Section 4442.1.

¹⁰ The Medicaid requirements are contained in Section 1902 of the Social Security Act.

¹¹ Unlike mandatory or optional state plan services, HCBS waivers can have capped enrollment, which can be used by states to limit utilization. As a result, waiting lists for HCBS waivers are often long. See, Ellen O'Brien, "Long-Term Care: Understanding Medicaid's Role for the Elderly and Disabled" *Kaiser Commission on Medicaid and the Uninsured* (2005). See, also, "*Olmstead v. L.C.: The Interaction of the Americans with Disabilities Act and Medicaid*," *Kaiser Commission on Medicaid and the Uninsured*, June 2004, p 2-3.

¹² "Congress recently enacted new flexibilities as part of the Deficit Reduction Act of 2005 that give states greater ability to expand home- and community-based services to certain Medicaid beneficiaries through a state plan amendment. However, because the new state plan option includes financial eligibility limits, states will still continue to operate home- and community-based care waivers." National Governor's Association Policy Position "HHS-28, Long-Term Care," March 5, 2007.

¹³ "Medicaid Home and Community-Based Service Programs: Data Update, December 2007," *Kaiser Commission on Medicaid and the Uninsured*. In addition to providing home and community long-term care through waivers, states can choose to provide

Medicaid HCBS though the mandatory home health benefit and/or the optional state plan personal care services benefit. But waivers are the primary Medicaid funding source. "In 2004, Medicaid spending on HCBS waivers was \$20.5 billion, compared to \$7.1 billion on state plan personal care services, and \$3.6 billion on home health services." *Kaiser Commission on Medicaid and the Uninsured*, "Medicaid Home and Community-Based Service Programs: Data Update, December 2007.

¹⁴ The 2008-09 Governor's Executive Budget, page E33.21.

¹⁵ The 2008-09 Governor's Executive Budget, page E6.7.

¹⁶ "Pa. Intra-Governmental Council on Long-Term Care, Home and Community-Based Services Barriers Elimination Work Group, March 2002, Revisited 2008," available online at www.paelderlaw.com.

¹⁷ For a discussion of institutional bias and the barriers to expansion of home- and community-based care, see, "Pennsylvania Intra-Governmental Council on Long-Term Care, Home and Community-Based Services Barriers Elimination Work Group, March 2002, Revisited 2008," available online at www.paelderlaw.com.

¹⁸ For a study of the existence of institutional bias in one state see "North Carolina Institutional Bias Study Combined Report," The Lewin Group, April 2006, available at www.dhhs.state.nc.us/dma/LTCReport.pdf.

¹⁹ The 2008-09 Governor's Executive Budget, page E33.22.

²⁰ The 2008-09 Governor's Executive Budget, page E33.22. In 2007-08, 70.3 percent of long-term-care recipients received their care in an institution.

²¹ *Olmstead v. L.C.*, 527 U.S. 581 (1999).

²² Commonwealth of Pa. Dept of Public Welfare Budget Briefing, Feb. 5, 2008, www.dpw.state.pa.us/Resources/Documents/Pdf/AnnualReports/DPWBudget_2008-09_2-

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²² For a description of support services, see Eiken, Nadash, and Burwell, "Profile of Pennsylvania: A Model for Assessing a State Long-Term Care System," Thomson Medstat, December 2006, www.cms.hhs.gov/NewFreedomInitiative/Downloads/PA_Profile.pdf.

²³ The 2008-09 Governor's Executive Budget, page E6.7.

²⁴ The PDA Waiver was initially implemented in Philadelphia County on Nov. 1, 1995. The program was expanded to 12 more counties effective 12/1/1996. Statewide expansion occurred Oct. 1, 1998. See, Centers for Medicare & Medicaid Services "Home and Community-Based Services Waiver Review Report" PA HCBS Waiver for Individuals Age 60 and Over," Oct. 26, 2007.

²⁵ Description from Pa. Department of Aging Web site, at www.aging.state.pa.us/aging/cwp/view.asp?a=284&q=173701.

²⁶ Centers for Medicare & Medicaid Services "Home and Community-Based Services Waiver Review Report" PA HCBS Waiver for Individuals Age 60 and Over," Oct. 26, 2007.

²⁷ The 2008-09 Governor's Executive Budget, page E33.22.

²⁸ Centers for Medicare & Medicaid Services "Home and Community-Based Services Waiver Review Report PA HCBS Waiver for Individuals Age 60 and Over," Oct. 26, 2007.

²⁹ The LOC changes have been a particular area of contention between elder law attorneys and other advocates and the Department of Aging. See further discussion below.

³⁰ The CMS report is available at www.paelderlaw.com.

³¹ *Federal Register*, Dec. 4, 2007, Vol. 72, No. 232, 68077-68093. To view the rule, visit www.cms.hhs.gov/MedicaidGenInfo/08_Medicaidregulations.asp.

³² Amending 42 U.S.C. § 1396n(g)(2).

³³ See, Robert Pear, "Governors of Both

Parties Oppose Medicaid Rules," *New York Times*, Feb. 24, 2008.

³⁴ "Home and Community Based Services Reform and Rebalancing Feasibility Analysis Final Report," Thomson Medstat, March 24, 2006, www.paproviders.org/Pages/MR_Archive/HCBS_Feasibility_Study_MedStat.pdf; Eiken, Nadash, and Burwell, "Profile of Pennsylvania: A Model for Assessing a State Long-Term Care System," Thomson Medstat, December 2006, www.cms.hhs.gov/NewFreedomInitiative/Downloads/PA_Profile.pdf.

³⁵ See, "Home and Community Based Services Reform and Rebalancing Feasibility Analysis Final Report," Thomson Medstat, March 24, 2006, www.paproviders.org/Pages/MR_Archive/HCBS_Feasibility_Study_MedStat.pdf.

³⁶ 42 U.S.C. § 1396n(c)(1).

³⁷ The 12-page level-of-care assessment (LOCA) tool is available online at www.aging.state.pa.us/aging/lib/aging/loca_feb_16_2007.pdf.

³⁸ See discussion of federal level of care requirements in *Maryland Department of Health and Mental Hygiene v. Ida Brown*, 935 A.2d 1128 (Md. Ct. Special Appeals, Nov. 27, 2007) available at <http://mdcourts.gov/opinions/cosa/2007/1572s06.pdf>.

³⁹ Prior to The Nursing Home Reform Law of 1987, Medicaid law categorized nursing homes into two levels: skilled care and intermediate care facilities. The Reform Law abolished the distinction effective Oct. 1, 1990.

⁴⁰ Available online at the Department of Aging Web site: www.aging.state.pa.us/aging/.

⁴¹ See, 42 U.S.C. § 1396r(a)(1)(C); 42 C.F.R. § 440.155. "Plainly, 42 C.F.R. § 440.155 does not require involvement of, or service provided by, skilled or trained medical personnel." *Maryland Department of Health and Mental Hygiene v. Ida Brown*, 935 A.2d 1128 (Md. Ct. Special Appeals, Nov. 27, 2007) available at <http://mdcourts.gov/opinions/cosa/2007/1572s06.pdf>.

⁴² "Long-Term Care: Federal Oversight

of Growing Medicaid Home and Community-Based Waivers should be Strengthened," U.S. Government Accountability Office, GAO-03-576, June 2003.

⁴³ Kasper, et al, "Long-Term Services and Supports: The Future Role and Challenges for Medicaid," *Kaiser Commission on Medicaid and the Uninsured*, September 2007.

⁴⁴ "CMS Report of Review of PA HCBS Waiver for Individuals Age 60 and Over, Oct. 26, 2007," available at www.paelderlaw.com/pdf/CMS_Report_PA_HCBS.pdf. The quality assurances that must be submitted by Pennsylvania are described in Appendix H of the Waiver Renewal Application, Application for a §1915(c) Home and Community-Based Waiver [Version 3.3] Instructions, Technical Guidance Review Criteria Release Date: November 2005.

⁴⁵ "Home & Community Based Barriers Elimination Work Group Report 2002, Revisited 2008," Pennsylvania Intra-Governmental Council on Long Term Care, pp 1-2. www.paelderlaw.com/pdf/HCBS_barriers_revisited.pdf

Jeffrey A. Marshall is certified as an Elder Law Attorney by the National Elder Law Foundation. He is managing attorney of Marshall, Parker & Associates, L.L.C., a member of the PBA Elder Law Section Council, and author of Elder Law in Pennsylvania, 2nd Edition. Marshall received his law degree from Stanford University in 1972. His free newsletter "The Elder Care Law Alert" is available through his Web site, www.paelderlaw.com. He can be contacted at webmail@paelderlaw.com.

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PAELA s Comment Submission on the PDA Waiver Renewal

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February 6, 2008

Office of Long Term Living
 Attention: Listening Sessions
 P.O. Box 2675 Harrisburg, PA 17105

Submitted via e-mail to ra-acwrenewal@state.pa.us

Re: Listening Session Written Comments regarding PA Aging Waiver (Home and Community-Based Services Waiver of Individuals Age 60 and Over) renewal.

Thank you for this opportunity to comment on the renewal of the Pennsylvania Aging Waiver.

The Pennsylvania Association of Elder Law Attorneys (PAELA) is an association of elder law attorneys who represent aging consumers in Pennsylvania. PAELA attorneys serve many consumers who qualify for Medicaid funded long-term care services through Home and Community Based Services Waiver programs. Our members help families with the problems they encounter in attempting to access needed services in the home. We believe our consumer oriented perspective gives us a singular ability to assist the Office of Long Term Living in re-balancing the long-term care delivery system. We welcome any opportunity to do so.

Although operational statewide in Pennsylvania for nearly 10 years, the success of the Aging Waiver has been impeded by complication, confusion, dysfunctional limitations, and delay. Delay is particularly destructive since the need for services is usually immediate, but immediate delivery is generally available only in an institution. As a result, the program has failed to fully realize its potential in helping the state realign the delivery of Medicaid funded long-term living services away from its traditional institutional bias.

We encourage the state to view the renewal application as an opportunity to improve access to Aging Waiver services. PAELA requests that the Office of Long Term Living consider the following recommendations in preparing its renewal application.

(1) The PA waiver renewal application should include coverage for intermediate care as “ordered by or provided under the direction of a physician under circumstances where, because of a mental or physical disability, the individual requires nursing and related health and medical services in the context of a planned program of health care and management.”

The Department of Aging’s recent imposition of a skilled care limitation for eligibility (APD #07-01-01 issued March 28, 2007) is not only inconsistent with federal standards, it also has reduced access to Waiver services, impacted the quality of care, increased reliance on solely state funded assistance, and increased the risk of consumer institutionalization. Pennsylvania should return to utilizing level of care eligibility criteria that include both skilled and intermediate care.

(2) The application should seek to implement the recommendations of the “PA Intra-Governmental Council on Long Term Care’s Home and Community-Based Barriers Elimination Work Group Report 2002” as updated in January 2008. A copy of that report is attached. Little has yet been done to eliminate wholly the 22 barriers identified six years ago and the state must not let this opportunity to do so pass it by.

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PAELA s Comment Submission on the PDA Waiver Renewal

(3) Pennsylvania should seek to exempt the Aging Waiver from the recently proposed Targeted Case Management (TCM) rules (72 Fed. Reg. 68077). Some of the TCM rule changes appear to go well beyond the requirements of the Deficit Reduction Act. Privatization of case management services will add to the delays already plaguing the home delivery system and will undermine the local area agencies of aging's ability to protect elderly Medicaid eligible consumers from neglect, abuse, and fraudulent activity.

The proposed TCM rules will also impede efforts to transition consumers from institutional to home and community settings. The reduction of Medicaid transition services from 180 days of coverage to only 60 days would indisputably limit the ability of consumers to transition home from institutional settings and further obstruct rebalancing efforts.

Consumer "freedom of choice" of case management provider (and the ability to choose no provider) will further fragment access to Aging Waiver services and limit Pennsylvania's ability to control and streamline their delivery. To improve access and utilization, the program needs simplification rather than further fragmentation.

Pennsylvania's Aging Waiver renewal application should seek an exception for this program from the new TCM rules at least until Pennsylvania can integrate the TCM changes into a comprehensive strategy that supports the shift from institutional to home and community-based care. If the Aging Waiver cannot be exempted from the interim TCM rules, the implementation of those rules should be delayed until they can be effectively implemented as part of Pennsylvania's overall re-balancing strategy.

Please feel free to contact either Marielle Hazen or Jeffrey Marshall at the addresses below if you have any questions or need clarification regarding these comments.

Sincerely,

Marielle F. Hazen, CELA*, President, Pennsylvania Association of Elder Law Attorneys
 Jeffrey A. Marshall, CELA*, President-Elect, Pennsylvania Association of Elder Law Attorneys
 *Certified Elder Law Attorney by the National Elder Law Foundation

CC: Honorable Estelle Richman, Secretary, Department of Public Welfare
 Honorable John Michael Hall, Deputy Secretary, Office of Long Term Living

Thanks to the Section members and others who contributed to this newsletter. It would not be possible without your help. We are sure you will agree that the newsletter is one of the most valuable benefits of membership in the Section.

We need your help to continue providing this high-quality resource. Please contact the editors with your offerings for publication, your request to be involved and with any suggestions in general.

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Medicare Savings Programs – Save Your Clients Nearly \$100/Month!

By *Beth Shapiro*

With out-of-pocket expenses for health care rising, older Pennsylvanians need to know about a valuable program that puts money back in their pockets. Most Medicare beneficiaries get Medicare Part A for free based on their or a spouse's work history, but they must still pay a monthly premium of at least \$96.40 for Medicare Part B benefits in 2008. The Social Security Administration generally deducts this premium from the Social Security payment before disbursing the money. Through Medicare Savings Programs (MSP), the Commonwealth of Pennsylvania pays the monthly premiums for Medicare Part B.

MSP make a tremendous difference in access to health care since Part B covers doctors' visits, lab work, home health care, and even some medications. People 65 years old and those determined disabled by the Social Security Administration can use the MSP to purchase Part B when they cannot otherwise afford the monthly premium. In addition, since many providers prefer billing Medicare to Medicaid, MSP can open the door to a wider array of treatment providers. Money saved from not paying the monthly premium can go toward copayments for medical care, including prescription drugs.

Eligibility

Numerous Pennsylvanians are completely unaware of their eligibility and the simple application process. The income eligibility requirements track the federal poverty guidelines (FPG) and allow for an additional \$20 of income that is disregarded by the County Assistance Office. For all three categories, countable assets must be less than \$4,000 for an individual and \$6,000 for couples.

The chart below provides more details about the income categories and benefits.

Although the QMB and SLMB programs are entitlements, the QI-1 program is dependent on time-limited Congressional appropriations. Congress recently authorized the program again through June 30, 2008, and will hopefully continue the program beyond that date.

How to Apply

The Department of Public Welfare has developed a short mail-in application for the MSP that can be printed out at www.dpw.state.pa.us/Resources/Documents/Pdf/FillInForms/MAIL-IN-MEDICARE.pdf. Applicants must mail or hand-deliver their applications to the County Assistance Office, but no interview is necessary. Please note that applicants who do not already have Part B coverage, including those who previously refused it because of the cost, can enroll in Medicare Part B *at any time during the year* through the Medicare Savings Program. They do not have to contact the Social Security Administration separately to enroll in Medicare Part B.

Post-Application

Delays of three months or more may occur before an enrolled person's Social

Security payment will reflect Pennsylvania's payment of the Part B premium because of the schedule for transmitting enrollment data electronically between the Department of Public Welfare, the Centers for Medicare and Medicaid Services, and the Social Security Administration. People enrolled in the Medicare Savings Programs should receive a refund from the Social Security Administration for any Part B premiums deducted from their payments since the date of eligibility determined by the County Assistance Office.

Appeals of the termination of the benefit should be filed with the County Assistance Office within 10 days of the date of the notice to continue benefits pending the outcome of the appeal. Otherwise, appeals must be filed within 30 days. If the termination or denial is based on missing documentation of income, assets or other eligibility criteria, providing the appropriate verification to the County Assistance Office can often resolve the matter prior to the hearing. ■

Beth Shapiro is a senior staff attorney with Community Legal Services, Inc., in Philadelphia. She can be reached at (215) 981-3700.

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MSP Category:	2008 Monthly Income:	Pennsylvania will pay:
Qualified Medicare Beneficiary (QMB) <i>100% of FPG</i>	\$887 or less (\$1,187 for couples)	The monthly Part B premium annual Part A and Part B deductibles, and Part A and Part B copayments.
Specified Low-Income Beneficiary (SLMB) <i>120% of FPG</i>	Between \$888 and \$1,060 (\$1,188 - \$1,420 for couples)	The monthly premium.
Qualified Individual (QI-1) <i>135% of FPG</i>	Between \$1,061 and \$1,190 (\$1,421 and \$1,595 for couples)	The monthly premium, but funding is available on a first-come, first-served basis

Understanding and Working with Nursing Homes: Things Attorneys Really Need to Know

By Jacqueline J. Shafer, MSW

Elder persons, particularly those who have lost the ability to communicate, are some of the most vulnerable persons in our society. Unable or afraid to complain, they are at risk for serious neglect and abuse. We're horrified at newspaper and television accounts of abuse: an aide guilty of kicking a helpless elder to death; a nurse who decided to play God with the lives of dozens (maybe hundreds) of nursing home residents by administering lethal doses of drugs to "put them out of their misery."

Most facilities seek quality.

Such appalling behavior is beyond the pale. Can this possibly be the norm? The answer is an unqualified, resounding "No." The vast majority of nursing homes, both for-profit and nonprofit alike, make quality care their goal. The administrators of these facilities are just as horrified as you and I at the prospect of harm happening to an elder living under their roof. They, like the families they serve, are determined to rid the industry of bad apples and provide excellent care. So, before you jump on the nearest white horse and unsheathe that legal sword, I encourage you to stop and consider a few things.

The nursing home industry is one of the most highly regulated industries in the country.

Understand the conditions under which a nursing facility operates.

The nursing home industry is one of the most highly regulated industries in the country. There are 240 licensed nursing (skilled and custodial care) facilities supervised by the Department



Jacqueline J. Shafer

of Health in nine regional jurisdictions throughout Pennsylvania. Most of these (126) are clustered evenly between the Philadelphia and Pittsburgh metropolitan areas. These facilities are stringently surveyed at least once a year and more often upon credible complaint.

Facilities live in trepidation (if not outright fear) of these surveys. Every square-inch of the building is scrutinized, charts are combed, residents are interviewed, employees are followed and the senior staff is interrogated during a three- to four-day process. The surveys can happen at anytime, day or night, weekend or weekday. There is a 15-month "window" in which they can occur — making the arrival of the survey team less predictable and the facility much easier to "catch" when less prepared for their arrival, and rightly so. The theory behind it is to keep facilities on their toes administering the best quality to residents all of the time, not just when a survey can be "expected."

Most facilities have "good service and excellent care" as their stated goals. Most follow internally developed quality assurance programs. To expect that they achieve their goals by diligent training, staffing adequately plus an adherence to the regulations and codes of the state is well within appropriate bounds. However, to expect that they create a totally risk-free environment for their residents is unrealistic, and furthermore, not a goal that can be achieved even with one-to-one, loving

family members beside the elder day and night in the elder's own home. Aging is just not "risk-free."

... to expect that they create a totally risk-free environment for their residents is unrealistic ...

Understand the true meaning and limitations of congregate living.

Placing a loved one in a nursing home is a traumatic event for both the disabled elder and the family, even if they remain unaware of it and its effect on everyone involved. Reducing a person's life to one room (much less reducing it to one-half of a room!) causes all kinds of angst for the person being placed and guilt for the child doing the placing. The guilt often causes the child to overcompensate with unrealistic expectations and placing demands on the nursing home to deliver care more like one-on-one attention. To insist on care that substitutes the care a family would give may shift some of the responsibility the child feels, but it is just not possible in a congregate setting.

For instance, making and delivering breakfast for each and every resident at an hour that coincides to how they lived outside the nursing home — when the regulations require a specific and maximum number of hours between meals and at specific temperatures and for specified amounts — is impossible. Bathing is another area that is difficult to replicate in terms of the elder's former life. I can just imagine what will happen when the Baby Boomers — most of us obsessing over cleanliness and sometimes taking more than one shower in a day — are reduced to getting one bath or shower a week!

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Understanding and Working with Nursing Homes: Things attorneys really need to know

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When resident assignments are made each morning, a staff member assumes the responsibility for assisting the resident to rise, freshen up and get dressed for the day. Each staff member may have as many as ten residents. Beginning at 7 a.m., someone is going to be first and someone is going to be last. This is a hard reality for residents and families to accept.

... there is a point beyond which no efficiencies are gained by adding more staff. Besides, the resulting additional cost will only deplete the resident's resources at a faster rate.

Nursing homes staff according to regulations (that can be found at 42 CFR Part 483, Subpart B and following). The average for Pa. nursing homes is around 3.2 hours of direct nursing staff-to-resident time per day. Could a nursing home remedy some of the problems above by adding more staff? The Centers for Medicare and Medicaid Services (CMS) in a study they conducted in 2001 on staffing ratios, has determined that there is a point beyond which no efficiencies are gained by adding more staff. Besides, the resulting additional cost will only deplete the resident's resources at a faster rate. (The CMS Web site can be found at www.cms.hhs.gov, and contains this study and a wealth of information including the survey standards and state manuals. The Pennsylvania State Operations Manual can be found at www.dsf.health.state.pa.us/health. These two sources contain all the information a practitioner could want regarding the code and regulations of the nursing home industry.)

Determine if there really is a problem.

You find yourself across the desk from a desperate client who thinks you should "do something" about the conditions that Mom is living with at the nursing home. What should you do? My answer is to consider that a client may be jumping to a conclusion before you react. Normal aging conditions in the elderly can mask or mimic abuse. Skin turgor, for example (the elasticity that in a younger person enables the skin to endure normal bumps without bruising), is compromised in the elderly, and the lack of it may cause bruises to form with only slight pressure, and a mere rubbing of the skin — even against a relatively smooth surface — can result in tears. As it turns out, there's a good reason for fewer baths as we age that has nothing to do with the staffing ratio — our skin dries out! More investigation is needed before coming to a conclusion that the elder is being neglected or abused.

Fractures can be "pathological." It's not unheard of for a person's hip to break while walking due to poor or decreasing bone density. The fall, in those cases, did not cause the hip to break — rather, the broken hip caused the fall and the subsequent laceration or hematoma of the head. Doctors should be encouraged to take a more forensic approach to why such accidents happen before labeling it neglect or pinning blame on the facility. My point is not to ignore the obvious — poor training or equipment malfunction may result in a bad accident and its follow up with educational remediation, as well as medical and legal scrutiny is entirely appropriate. I'm merely suggesting that sometimes it's nobody's "fault."

How to handle routine complaints.

For the most part, complaints are best handled by going directly to the charge nurse or through attendance at

the quarterly care conference. Each resident is reviewed by the care team at least four times per year. A "care plan" is developed at these meetings and generally involves all aspects of the resident's life in the facility — his health needs, psych-social needs, dietary and therapeutic needs, spiritual and activity needs — are all addressed at these care conferences and written into the care plan. Encourage your client to be involved — to visit the facility often and at differing times of the day, and to make an effort to attend the quarterly care conference.

All of that said, it is time for you to take action when a serious injury occurs. If pathology is not the cause, all fractures should be suspect — and the leading cause of injury is lack of education/training or equipment malfunction.

The Financial costs.

When you get right down to it, most of the reason for your client jumping up and down is over the high *cost* of nursing home care. At worst, they see any inheritance they might get as going into a black hole; at best, they wonder if Mom is getting what she's paying for. Those elders lucky or savvy enough to have purchased long-term-care insurance have some, (but usually not all), of the financial pain eased. I've also discovered that many attorneys have no idea how a nursing home gets paid. They are troubled by the cost of care — upwards of \$100,000 a year is common today and more if the person is in a private room. So, where does the money go?

The largest cost center in a nursing facility is personnel. Room, board and incidentals (like incontinence care products) represent a much smaller percentage of the total bill. A number of years ago, I worked in a long-term-care (CCRC/continuing care retirement community) facility, and I decided to do

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Understanding and Working with Nursing Homes: Things attorneys really need to know

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a simple study on where the dollars went. Here's what I found. My facility staffed at a higher ratio than the state average because of their commitment to care. This increased our daily costs, but only by a slightly higher percentage than the state average.

The actual cost per day in that facility was \$209. The private pay rate at the time was \$255 for a bed in a semi-private (double) room. Well, that looks like the facility is making at least a small profit per day on each bed. Not so. When a facility agrees to either take a resident who already qualifies for Medicaid, or when one of its current residents runs out of money and converts to Medicaid, it does not receive the equivalent of private pay dollars from the Medicaid program.

The Medicaid *rate* for our facility was \$150 per day. The residents own

income is applied first to the MA bill; the state MA program makes up the difference *up to the \$150/day rate*. (\$150 x 30 days = \$4,500/month — a far cry from the \$7,500-\$8,000 per day “private pay rate.”) Every resident in a Medicaid bed created a \$59/day shortfall. At the time, the facility was running with about 50 percent Medicaid recipients. It was the private pay dollars that helped to subsidize the MA shortfall — and barely at that. No wonder facilities are so cautious about how many MA beds they are running with at any given time.

Conclusion

While it's impossible for me to cover all aspects of understanding nursing homes and dealing with them in this brief article, what I hope I've highlighted is a new sense of awareness. Since the DRA,

the elder law attorney's practice has significantly changed. When families cannot avoid spending the few resources that the middle-class mom or dad has left, they may become more disenchanted with the facility and, as a consequence, turn to you for redress. Caution should be your byword; investigate before taking action. Remember that one of the hats an attorney wears is “counselor” — you may need to hone that skill to provide families with a balanced view of the care their loved one is receiving. ■

Jacqueline J. Shafer practices elder law at the firm of High Swartz, L.L.P. in Norristown. She also has over 20 years experience in long-term care and mental health venues. She can be reached for comments at jshafer@highswartz.com

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June 4-6, 2008

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Awards Breakfast/Luncheon

Continuing Legal Education

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Women in the Profession Conference

PA Bar Foundation Silent Auction

Pennsylvania Bar Association Annual Meeting



HERSHEY LODGE & CONVENTION CENTER, HERSHEY, PA.

Practice Pointers: Post-Eligibility Medicaid Planning

By Julian E. Gray

As elder law attorneys, many of our practices involve assisting our clients and their families in the Medicaid, or Medical Assistance (MA), application process. This can be as “simple” as guiding our clients through the maze of regulatory guidelines and local customs to achieve eligibility. Or, it can be as complex as defending a legal position through a lengthy appeal process. Regardless of the route traveled in obtaining MA eligibility for our clients, the representation often does not end there. In order to provide clients with comprehensive representation, we must follow through after eligibility is achieved to address outstanding issues that may impact clients and their families in the future. These post-eligibility maneuvers often involve recognizing potential estate exposure to estate recovery claims and elective share issues.

There are already a number of reported cases of legal malpractice in several jurisdictions and as the popularity and necessity of MA planning increases, practitioners should be cognizant of the post-eligibility issues and work to reduce or eliminate exposure for their clients. In addition, lawyers should specifically identify the scope of work at the outset of an engagement with a potential MA applicant client to clearly set forth the expectations of both parties for services to be provided.

In a case I handled “post eligibility,” I was contacted by a nursing home resident who was already receiving MA benefits. In reviewing the history of her case, I learned that she was recently widowed and had two surviving adult children. She had entered a nursing home the year before and hired an attorney to handle her case. Even though she obtained benefits, she was erroneously

informed that since her husband’s IRA was an exempt asset for her MA eligibility, she did not need to make any changes to it. In addition, she owned her home jointly with her late husband and was informed that since their home was an exempt asset, no further action was necessary. Finally, her husband was not informed of his option to revise his Last Will and Testament to leave his estate to his children and disinherit his spouse. Obviously, I had my work cut out for me since by the time I met with the client, her husband had already died. While there were a number of options still available to the client, the estate preservation was substantially compromised and the client did lose MA eligibility for a brief period of time. This scenario could have been avoided with some elementary planning maneuvers simultaneously with, or shortly after the original MA eligibility was awarded. That said, there are a number of “checklist” items that every elder law attorney should investigate in closing out the post-eligibility stage of MA planning.

This list is not meant to be exhaustive, but identifies the common mistakes and opportunities to provide a comprehensive plan for the client and her family. This analysis assumes that since one of the goals of achieving MA eligibility is to preserve estate assets, the client and family wish to further estate preservation for the healthy spouse and next generation.

1. Legal Documents:

For a married applicant, assuming the community spouse (CS) has the requisite capacity, the CS should consider revising her Will to disinherit the institutionalized spouse (IS). If the CS predeceases the IS (which happens occasionally), the CS’ estate will pass directly to beneficiaries other than the IS, thus protecting a significant portion of the estate.

Of course, if the IS survives the CS by six months, the IS (usually through his agent or guardian) must claim the elective share or the waiver of such elective share will be considered an uncompensated transfer by DPW, subjecting the IS to a penalty period and possible discontinuance of benefits. However, this scenario is still effective in preserving two-thirds of the CS’ estate from long-term-care cost exposure.

The CS should also be advised that she may also require long-term care in the future. The attorney should review the CS’ current Durable Power of Attorney and explain the laws governing the agent’s authority to make gifts of the principal’s assets under the appropriate circumstances. If the CS is so inclined, she can prepare a new POA to incorporate broad gifting authority to her agent, so that she can keep her options open in the event she becomes incapacitated in the future.

After the implementation of Act 169 in 2007, the CS’ Healthcare POA and Living Will should be reviewed and updated as needed. Sometimes, a client has only named her spouse as her agent and it behooves her to revise the document to simply add successor agents to make sure a trusted individual is vested with this authority if needed to manage health care and end-of-life treatment decisions.

2. Asset Positioning:

Many CSs are relieved to know that they are entitled to the protected Community Spouse Resource Allowance (CSRA). In addition, a CS may also have the benefit of retaining a primary residence and qualified plans (such as IRAs, 401ks, etc.). However, the analysis needs to go one step further and investigate scenarios for the disposition of such assets upon the death of

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Practice Pointers: Post-Eligibility Medicaid Planning

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the CS. This analysis begins with the spousal deeming of all marital assets upon application for MA, and transitions through the remaining protected assets upon eligibility.

Upon MA approval, the married couple has 90 days to transfer assets held by the IS to the CS. While this may seem like a significant time period, the client should not delay in beginning this process prior to MA approval for a variety of reasons. The first is obviously to comply with the MA regulations. The second is to set up the CS' personal estate so that upon the CS' death, the maximum amount of marital assets can be preserved. There are many delays that can be encountered in dealing with third parties. Transferring ownership of annuities, brokerage accounts, demutualized stock and other assets owned by the IS can take several months even though the client submits the necessary documentation to these third parties in a timely manner.

Once the protected assets of the CS are titled solely in the CS' name, care should be taken to structure such assets to minimize exposure upon death. This may include changing the beneficiaries of contractual assets such as IRAs and life insurance policies. For example, a CS' IRA may be an exempt asset for the IS Medicaid eligibility, but failure to change the designated beneficiary of the IRA could thwart the protection of this asset upon the CS' death. Even exempt life insurance policies or policies that comprise the CSRA should be confirmed to remove the IS as the beneficiary. Another helpful maneuver is to title investment accounts retained by the CS as "POD" (payable on death) or "TOD" (transfer on death) to a beneficiary other than the IS. This not only avoids the asset returning back to the IS, but avoids probate, which saves the CS beneficiaries time and expenses of administration.

Generally, once the IS is approved for MA benefits, each spouse will continue to receive his or her respective income from sources such as Social Security, pensions, annuity income and investment returns. Another good practice is to set up distinct operating accounts to keep marital assets separate for continuing MA resource eligibility while minimizing exposure upon the death of the CS. These operating accounts are meant to administer the spouses' monthly income streams efficiently. One technique involves having the IS and CS maintain a joint checking account. The only income that should be deposited into this account each month is the IS' income. This account will only be used to pay the IS' private-pay portion of the nursing home costs each month, pay health insurance premiums and access the personal needs allowance (currently \$45/month). This IS operating account is jointly titled with the CS purely for convenience purposes so that upon the death of the IS, the funds remaining in the account will automatically pass to the CS without probate and avoid the estate recovery claim.

The second operating account should be titled in joint names with the CS and one or more of her children. This account will be used to receive CS' monthly income and used to provide for her daily living expenses. As with the IS' account, the joint titling will avoid probate upon the death of the CS. Additionally, if the CS predeceases the IS, the funds in this account will go directly to the CS child, not the IS, which could potentially jeopardize the IS' continuing MA resource eligibility.

Finally, always confirm that your client knows exactly how much to pay the nursing facility from the date the MA application is filed through the eligibility date. In some counties, it can take months to receive a benefits eligi-

bility determination. During that time period, the client should be promptly paying the nursing facility the estimated private-pay portion that will be required upon approval in the future. By making these payments to the facility from the start, the client builds goodwill with the nursing facility and is less likely to spend the money on something else while the application is pending. So, this notification to the client should be in writing simultaneously with or shortly after the filing of the MA application. If the MA applicant is receiving VA Aid and Attendance benefits, these benefits will likely be substantially reduced upon MA approval. Therefore, you should adjust the private-pay portion accordingly and notify the VA of the existence of MA benefits. It will take several months for the VA to "catch up" with the MA eligibility and adjust the benefit amount.

These are just some of the issues that should be dealt with proactively during and after the MA approval process. So the next time you receive a 162 Notice of Eligibility for your client, remember that a thorough representation does not end with obtaining MA approval. Review your post-eligibility checklist with your client to ensure all the bases are covered. ■

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Penn State Dickinson Clinical Students Expand Outreach Through “Senior Law Day”

By Trisha Cowart

On Feb, 27, 2008, Penn State’s Elder Law and Consumer Protection Clinic hosted a “Senior Law Day” for the residents of the One and Two West Penn Apartment Buildings in Carlisle. The two buildings have over 180 one-bedroom apartment units for individuals who are 55 or older or who are mobility impaired. Jean Frazier, a former student at Penn State Dickinson School of Law, who has worked as a volunteer in the past with residents, recognized the need for on-site legal services and she helped in making the arrangements, advertising and hosting the event.

The Senior Law Day was an opportunity for the residents, particularly those who use assistive devices such as wheelchairs or walkers, to have easy access to a no-cost consultation with the Clinic’s certified legal interns. Law students, supervising attorneys and Professor Katherine Pearson temporarily moved the Clinic to Two West Penn’s community room for the afternoon, in order to meet with older adults to discuss their legal needs. The room was large enough to permit separate “mini”-consultation stations. Students were prepared to consult on several legal topics including:

- Simple wills and basic estate planning
- Consumer rights (including tenants’ rights)
- Debt collection and bankruptcy
- Medicare and Medicaid
- Social Security and Disability
- Grandparents’ rights



Over the next few weeks, the students will follow up with their new clients in order to execute the documents requested and to provide more comprehensive legal advice. Due to the success of the inaugural event, the Elder Law and Consumer Protection Clinic plans on

holding a “Senior Law Day” each semester. ■

Trisha Cowart is an Elder Protection Fellow at the Penn State Dickinson School of Law.

Looking for a Pro Bono Opportunity that Does Not Involve Litigation? Check out the Pennsylvania SeniorLAW Helpline!

By Sue Wasserkrug

The Pennsylvania SeniorLAW Helpline (Helpline) offers an unusual pro bono opportunity for lawyers throughout the state, particularly those who specialize in elder law. Volunteering for the Helpline does not require going to court, writing documents or handling administrative matters. Instead, volunteers share their legal expertise with older Pennsylvanians who need legal information and advice.

The Helpline provides free legal counseling to all Pennsylvania residents age 60 and older through the use of a toll-free number: 1-877-727-7529, or 1-877-PA SR LAW. The Helpline is a project of SeniorLAW Center in Philadelphia, a nonprofit organization that protects the legal rights and interests of seniors (age 60 and older) through direct legal representation; advice, information and referrals; community outreach and legal education; professional training and advocacy. SeniorLAW Center is celebrating its 30th anniversary this year.

Older Pennsylvanians can call the toll-free Helpline Monday through Friday, 10 a.m. to 4 p.m. An intake advocate screens the calls, gathers basic contact and demographic information, and schedules a time for an attorney to call the senior citizen and provide legal counseling. The attorney calls from his or her own office. Volunteer attorneys are handling an increasing number of these calls, although most are handled by the Helpline director.

Prospective volunteers receive basic training on Helpline protocols, after which they fill out a form indicating what areas of law they are willing to talk to seniors about, and when they are available to talk to seniors. The training can be conducted in person or by tele-

conference and generally lasts about an hour.

Volunteers receive a CD with a multitude of resources to assist them in handling calls. The CD contains our “Legal Resource Directory for Older Pennsylvanians,” which includes a county-by-county listing of legal resources (e.g., legal aid offices, lawyer referral programs, law school clinics, etc.), as well as a listing of statewide services (e.g., Food Stamps Hotline, Elder Abuse Unit at the Attorney General’s office, Pennsylvania Human Relations Commission, etc.). The CD also contains sample forms, useful background information, and our “Web Resources for Volunteers,” a listing of helpful Web sites.

Most of our pro bono attorneys volunteer once a month, for a “session” that lasts approximately two hours. In general, volunteers pick a particular day and time every month, such as 3 to 5 p.m. on the first Monday of every month. Other volunteers give an initial day and time and, upon completion of each session, they indicate their availability for the next month. Although the Helpline accepts incoming calls from 10 a.m. to 4 p.m., volunteers can schedule “sessions” earlier or later; several current volunteers call seniors in the early evening. Volunteers are given two or three calls to handle during the two-hour “session”; calls average 30 minutes but vary immensely.

(Volunteering once a month is a suggestion; we are happy to accommodate volunteers who are available either more often or less often. Additionally, for volunteers with expertise in legal areas that do not come up as frequently — e.g., torts — we have an “on call” arrangement, where we contact those volunteers as needed, and schedule calls as convenient. Occasionally we offer

training for Helpline volunteers as a two-hour CLE program, and we ask trainees to commit to six two-hour sessions — scheduled at their convenience — in exchange for two CLE credits.)

Prospective volunteers often voice concerns about professional ethics: Is an attorney-client relationship established? Do callers have expectations about ongoing representation? What about conflict checks? Pennsylvania Rules of Professional Conduct provide answers to these questions and guide Helpline protocols. Specifically, Comment [1] to Rule 6.5 (Nonprofit and Court Appointed Limited Legal Services Programs) indicates that “a client-lawyer relationship is established” — in limited representation situations such as legal hotlines or helplines — “but there is no expectation that the lawyer’s representation of the client will continue beyond the limited consultation.” At the Helpline, we alert all callers at intake that the attorney’s service will be limited to advice, information and referrals, and every attorney begins each call by clarifying the limited nature of the service and obtaining the caller’s consent to such service, per Comment [2] to Rule 6.5. Furthermore, our Legal Resource Directory for Older Pennsylvanians enables volunteers to provide a referral if the volunteer determines that additional legal assistance is necessary.

As for conflicts, Rule 6.5 enables volunteers to provide limited legal services, such as legal counseling through a helpline, without conducting a complete conflict check, unless the volunteer knows of a conflict. Of course, if continuing representation ensues, then the volunteer must check for conflicts, but this situation does not occur with the Helpline.

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Looking for a Pro Bono Opportunity that Does Not Involve Litigation? Check out the Pennsylvania SeniorLAW Helpline!

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A week or two after a volunteer handles a Helpline call, one of our staff places a follow-up call to the senior to gauge caller satisfaction and to assess the effect of our service. These follow-up calls also provide data that allow us to report meaningful outcomes to our funders.

All volunteers are added to the distribution list for our quarterly electronic newsletter, which contains information about legal issues that affect senior citizens in Pennsylvania. We also ask all callers if they have an e-mail address and, if so, whether they would like to receive the newsletter. Naturally all seniors who have e-mail ask to be added to the list! The target audience is seniors, not professionals, although the newsletter is distributed to numerous providers of services to seniors. (To subscribe, you can send an e-mail to helpline@seniorlawcenter.org.)

Senior legal helplines are a particularly effective way of serving seniors, especially those who are traditionally underserved. The Pennsylvania SeniorLAW Helpline now serves nearly 1,500 seniors a year. As the demand for our service grows, so does our need for volunteers. Please feel free to contact me at (215) 701-3216 or swasserkrug@seniorlawcenter.org if you would like to participate in this unique and important pro bono opportunity. ■

Sue Wasserkrug is the director of the Pennsylvania SeniorLAW Helpline, SeniorLAW Center, 100 S. Broad Street, Suite 1810, Philadelphia, PA 19110.

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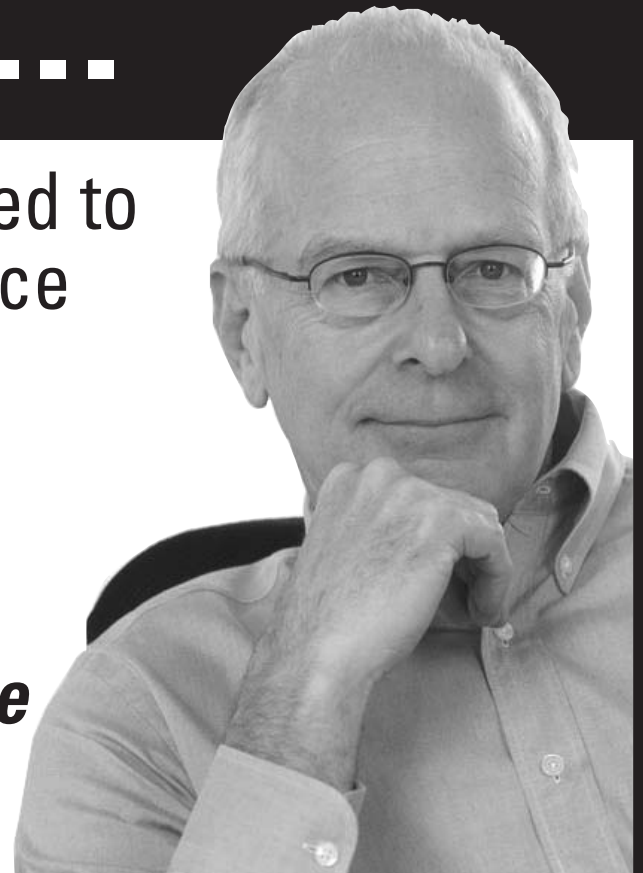


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Legislative Update

By *Steven Loux*,
PBA Legislative Counsel

The PBA Legislative Department seeks to inform section members about adopted or pending legislation that affect our practice areas. The Section encourages members to express opinions regarding any pending legislation's importance or impact by contacting appropriate legislators, the PBA Legislative Department or the leaders of the section. To obtain copies of any bill cited below, please e-mail me at steven.loux@pabar.org, call (800) 932-0311, Ext. 2246, or directly access bills and other legislative information online at www.legis.state.pa.us.



Steven Loux

LEGISLATION

Below find bills by topic that were not included in the previous newsletter Update, or that were included in that Update and have since passed the House of Representatives or the Senate. Bills referred to within parentheses can be found in the previous Update. Unless specified, none of the bills listed have passed the Chamber where they were introduced. Unless otherwise noted, the PBA has no position on the bills and is providing each summary for informational purposes only. All dates refer to 2007 unless otherwise specified.

Care Homes and Long-Term Care

HB 642, sponsored by Rep. Don

Walko (D-Allegheny), amends Title 18 (Crimes and Offenses) further providing for the offense of neglect of care-dependent person by providing that a caretaker is guilty of neglect of a care-dependent person if he or she intentionally, knowingly or recklessly endangers the welfare of a care-dependent person for whom he or she is responsible to provide care by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of the person. A violation is a second-degree misdemeanor, but if the conduct endangers the welfare of a care-dependent person, a third-degree felony. The bill passed the House 196-0 on Apr. 24, and as amended received second consideration in the Senate on Nov. 14. Relatedly, **HB 2036**, sponsored by Rep. Jim Wansacz (D-Lackawanna), amends Title 18 by providing that a caretaker is guilty of neglect of a care-dependent person if he or she intentionally, knowingly or recklessly commits an offense that results in the death of the care-dependent person. The Pennsylvania Commission on Sentencing shall provide for a sentencing enhancement for this offense. **SB 732**, sponsored by Sen. Robert Wonderling (R-Montgomery), amends Title 18 further providing for neglect of a care-dependent person by amending the definition of "caretaker." Caretaker is defined as a person that meets any of the following: (1) Is an owner, operator, manager or employee of any nursing home, personal care home or domiciliary care home; a community residential facility or intermediate care facility for a person with mental disabilities; an adult daily living center; a home health agency or home health service provider whether licensed or unlicensed; or an entity licensed under the Health Care

Facilities Act. (2) Provides care to a care-dependent person in the settings described under (1). (3) Has an obligation to care for a care-dependent person for monetary consideration in the settings described under (1) or in the care-dependent person's home. (4) Is an adult who resides with a care-dependent person, unless there is another responsible adult in the residence which has a superior obligation to provide care because of familial relationship, contract or court order. (5) Is an adult who does not reside with a care-dependent person but who has assumed responsibility for care or who has responsibility by contract or court order. **SB 1104**, sponsored by Sen. Jane Orié (R-Allegheny), amends Title 18 further providing for the offense of neglect of a care-dependent person by adding that neglect resulting in death would be considered a first-degree felony carrying a mandatory minimum sentence of three years in prison. (**HB 681** also further provides for the offense of neglect of care-dependent person.)

HB 941, sponsored by Rep. Robert Godshall (R-Montgomery), exempts continuing care retirement communities from the medical assistance bed approval process and allows nursing facilities operated by continuing care retirement communities to obtain medical assistance certified beds under certain terms and conditions. When a licensed nursing facility is part of the continuum of care of a continuing care retirement community (CCRC) regardless of whether the nursing facility currently has beds certified by the medical assistance program, the nursing facility shall have a limited number of beds certified by medical assistance through an applica-

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tion to DPW. A nursing facility of the CCRC shall receive reimbursement under the medical assistance program as a participating provider effective on the date the medical assistance eligible resident meets medical assistance eligibility requirements. Relatedly, **SB 577**, sponsored by Sen. Stewart J. Greenleaf (R-Montgomery), the Continuing Care Retirement Community Act, exempts licensed nursing facilities operated by a licensed CCRC from the requirements under 55 Pa. Code §§ 1187.21(2) (relating to nursing facility participation requirements) and 1187.21a (relating to nursing facility exception requests — statement of policy) under the following conditions: (1) the CCRC has admitted over 400 residents under a continuing care agreement, and (2) the nursing facility is part of the CCRC campus. The bill provides for certified and noncertified nursing facilities on a CCRC campus.

HB 967, sponsored by Rep. Bernard O'Neill (R-Bucks), the Medical Assistance Bed Transfer Act, gives DPW the authority to transfer certified beds — a facility bed that is certified by DPW to receive medical assistance reimbursements — from one facility to another facility, reduce the total number of certified beds and promulgate regulations governing the Medical Assistance Bed Transfer Program. Under the program, DPW shall offer a requesting facility a number of certified beds not to exceed the number requested nor half of the certified beds that facilities are willing to surrender to DPW. If more certified beds are offered than needed, DPW shall decide which facilities will surrender beds. A facility that receives a certified bed need not place it in service for the exclusive use of medical

assistance-eligible residents. Reimbursements are provided for under the bill. **SB 896**, sponsored by Sen. Greenleaf, is very similar, but DPW does not have the authority to reduce the total number of certified beds.

HB 1034, sponsored by Rep. Edward Wojnarowski (D-Cambria), the Direct Care Advanced Training Act, establishes the Direct Care Advanced Training Program, an advanced training program for direct care workers, in the Department of Education (DoE). The program consists of three categories of certification: behavioral care, restorative care and leadership. A direct care employee may receive benefits and participate in any category of certification. The bill outlines the training requirements and a tuition reimbursement program. DoE shall annually prepare and submit a report to the General Assembly on the program.

HB 1583, sponsored by Rep. Phyllis Mundy (D-Luzerne), amends Title 35 (Health and Safety) providing for the licensure and regulation of assisted living residences and services. Anyone intending to operate an assisted living residence shall be required to apply for and obtain a license as a health care facility under the Health Care Facilities Act (HCFA) and shall be subject to all authorities and enforcement powers of the Department of Health (DoH). In addition to the requirements set forth in the HCFA, the requirements for assisted living residence licensure shall include the requirements of this chapter along with any additional DoH-imposed requirements.

HB 1788, sponsored by Rep. Barbara McIlvaine Smith (D-Chester), the Personal Care Homes Licensing and Inspection Reporting Act, requires that DPW by Mar. 1 submit an annual report relating to the licensing and

inspection of personal care homes to the governor and the chief clerks of the Senate and House. The bill passed the House 196-0 on Oct. 3, and was then referred to the Senate Public Health and Welfare Committee.

HB 1830, sponsored by Rep. Mundy, amends the Family Caregiver Support Act removing the definitions of “adult,” “chronic dementia” and “relative;” adding definitions of “adult with chronic dementia” and “care recipient;” and expanding the definition of “primary caregiver.” The bill also increases the maximum amount available to a qualified primary caregiver whose care receivers’ household incomes is less than 200 percent of the federal poverty guideline: for out-of-pocket expenses from \$200 to \$500 per month, and for expenses for home modifications or assistive devices from \$2,000 to \$6,000 for the entire duration of the case. The bill passed the House 198-0 on Oct. 23, and received first consideration in the Senate as amended on Dec. 11. **The PBA supports this bill.**

HB 1859, sponsored by Rep. Jim Cox (R-Berks), amends the Public Welfare Code (PWC) further providing for the state plan for regulating and licensing personal care homes, by adding that within 48 hours of receipt of a complaint from any person alleging an immediate serious risk to the health and safety of a resident of a personal care home or an assisted living residence, DPW shall conduct an on-site unannounced inspection of the home or residence.

HB 1952, sponsored by Rep. Katharine Watson (R-Bucks), the Care Facility Carbon Monoxide Detector Act, requires, under the authority of the DPW, the placement of carbon monoxide detectors in residential facilities with care-dependent individ-

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uals and allows for a penalty of \$300 per day to be levied on delinquent institutions. The Act provides for the same requirements, administered by the DoH, for long-term-care nursing facilities.

HB 2034, sponsored by Rep. John Bear (R-Lancaster), the Long-Term Care Patient Access to Pharmaceuticals Act, allows a pharmacist employed by a long-term-care facility or a pharmacy, or employed by or contracted with a long-term-care facility, to repackage, re-label and dispense the drugs in a unit dose under certain conditions. Only individuals eligible for benefits provided by the Veterans' Administration are eligible for this program. A two-year record-keeping requirement is imposed upon the dispenser, who is allowed to impose a reasonable fee that is no more than the maximum dispensing fee authorized by the DPW regulations under the Medical Assistance program. The person dispensing the drug would be immune from civil liability arising out of dispensation of the drug if the person properly repackages and re-labels the drug based on the information received from the original drug source facility. Immunity is also provided for administering the drug. **SB 778**, sponsored by Sen. Gibson Armstrong (R-Lancaster), is very similar, differing only in the fees that may be charged by the dispenser and that a drug that is a controlled substance may not be repackaged, re-labeled and dispensed. SB 778 passed the Senate 49-0 on Dec. 4, and was then referred to the House Health and Human Services Committee.

HB 2099, sponsored by Rep. Watson, amends the PWC further providing for State plan for regulating and licensing

personal care homes, for Intra-Governmental Council on Long-Term Care and for rules and regulations for personal care homes and assisted living residences.

HB 2109, sponsored by Rep. Ken Smith (D-Lackawanna), amends the Older Adults Protective Services Act (OAPSA) further providing for reporting by employees of instances of neglect at such levels where serious physical harm or the threat to life and safety will result.

HB 2114, sponsored by Rep. Frank Shimkus (D-Lackawanna), amends the OAPSA further defining "facility;" and providing for the definitions of "chronic dementia" and "cognitive impairment." The bill provides that in any facility in which a physician holds a financial or ownership interest and is the attending or primary care physician for a resident or prospective resident, that physician must disclose the interest to each facility resident and responsible family member or legal representative of the resident. The resident, responsible family member or legal representative would have the right to choose the physician disclosing the interest or an independent physician as the resident's primary care physician. The bill further provides that if a facility resident has a cognitive impairment or chronic dementia and has no responsible family member or legal representative, the physician must disclose the interest to the agency which would assist the resident in choosing a primary care physician. The Department of Aging (DoA) shall promulgate rules and regulations as to the additional powers, duties and responsibilities of the agency assisting residents under these provisions.

HB 2161, sponsored by Rep. Karen Boback (R-Luzerne), the Long-Term Consumer Care Relocation Coordin-

ation Act, requires certain long-term-care facilities to coordinate with licensing agencies and local area agencies on aging to provide assistance to consumers in circumstances involving relocation of consumers. The local ombudsman shall ensure that a consumer is involved in planning such transfers and is afforded the right to choose among the available alternative placements. In a relocation, the appropriate licensing agency shall take a lead role and shall ensure that facilities involved in the relocation comply with the provisions of this act as a condition of licensure. Lastly, DoA shall ensure that the local ombudsman in each area agency on aging (AAA) complies with the provisions of this act.

HB 2182, sponsored by Rep. Edward Staback (D-Lackawanna), amends the PWC requiring DPW to initiate unannounced on-site investigations of complaints at personal care homes and assisted living residences and outlining the components of the investigation and when the investigation must commence, based on the type of complaint. The bill also outlines the action that must be taken following the conclusion of the investigation.

HB 2183, sponsored by Rep. Staback, amends the HCFA defining "general complaint," "immediate jeopardy" and "priority complaint." DoH shall initiate on-site investigations of complaints at health care facilities within 24 hours if the complaint is a priority complaint, or within 48 hours if the complaint is a general complaint. Additionally, once the plan of correction has been approved by DoH, the follow-up inspection shall be conducted after the longest target date for compliance has been reached as noted on the plan but no later than 90 days after DoH's initial inspection to ensure compliance with the plan.

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HB 2242, sponsored by Rep. Mauree Gingrich (R-Lebanon), the Long-Term Care Consumer Notification Act, requires long-term-care facilities and home- and community-based providers to post certain information relating to licensure, notices of enforcement and where to find information relating to the licensing agency. Additionally, long-term-care providers must maintain for each consumer a current record of the name, address and telephone number of the consumer's designated person, which must be provided upon request to the commonwealth agency responsible for oversight of the provider. Whenever a long-term-care provider receives a notice of enforcement action and a summary of such action from the commonwealth, the summary shall be transmitted to the consumer's designated person within seven days.

HB 2253, sponsored by Rep. James Marshall (R-Beaver), amends the PWC further providing for regulation of personal care homes by increasing the minimum personal needs allowance for an eligible individual from \$25 to \$120.

SB 649, sponsored by Sen. LeAnna Washington (D-Philadelphia), the Nursing Home Staffing Level Act, provides for minimum staffing standards for nurse aides and licensed nursing personnel. Facilities that do not meet the standards outlined within two years would not receive a license renewal. Facilities shall post for each care unit of the facility and for each shift the current number of licensed nurses and nurse aides directly responsible for resident care and any other staff directly responsible for resident care, as well as the current ratios of residents to staff showing separately

the number of residents to licensed nurses and the number of residents to nurse aides.

SB 667, sponsored by Sen. Patricia Vance (R-Cumberland), amends the OAPSA further providing for legislative policy, for definitions, for involuntary intervention by emergency court order and for grounds for denying employment; and providing for comparison study by DoA and for applicability relating to criminal history for employees. The definition of "facility" is amended to include a hospice, a home care agency, a home care registry, and a continuing care provider, and does not include an entity licensed to provide drug and alcohol addiction treatment services. The bill authorizes an agency to petition for an emergency order to provide protective services to an older adult who is at imminent risk of death or serious physical harm including exploitation that may lead to imminent risk of death or serious physical harm. Additionally, the bill enumerates offenses which are grounds for denying employment permanently or for 10 years. The DoA Secretary shall coordinate a comparison study on the impact of utilizing the Pennsylvania State Police criminal background check system and the FBI background check system.

SB 706, sponsored by Sen. Michael Stack, III (D-Philadelphia), amends The Insurance Company Law of 1921 providing for scope of article, for the definition of "long-term-care insurance," for the Long-Term Care Partnership Program, for authority to promulgate regulations, for marketing and advertising prohibited and for penalties; and further providing for coverage and limitations. The bill creates the Long-Term Care Partnership Program. All insurers shall offer to exchange any policy or certificate issued between Feb. 8, 2006, and the

date of the state plan amendment for this program, with a qualified Long-Term Care Partnership Program policy. Additional amounts for insurance coverage are further revised. **HB 966**, sponsored by Rep. Rick Taylor (D-Montgomery), amends the same Act, providing for the definition of "long-term-care insurance" and further providing for coverage and limitations. (The bill also provides for other unrelated issues). HB 966 passed the House 200 to 0 on June 26, passed the Senate as amended 29 to 19 on June 30, and was then re-referred to the House Rules Committee.

SB 1105, sponsored by Sen. Orie, amends the PWC further providing for regulating and licensing personal care homes and assisted living residences by adding that the preliminary plan must include provisions pertaining to conflict of interest in situations where the owner of the facility is also the primary care physician for some or all of its residents; and training of facility staff on recognizing and handling cases of resident abuse, neglect and self-neglect. A report on each inspection of a personal care home or assisted living residence, and any actions taken by DPW or the facility in connection therewith, must be made available to the public on the Internet.

SB 1106, sponsored by Sen. Orie, amends the OAPSA by adding that the term "self-neglect" means the failure to provide for oneself so as to avoid a serious threat to one's own physical or mental health. The bill requires an employee or an administrator who has reasonable cause to suspect that a recipient is a victim of self-neglect must immediately make an oral report to the agency.

Health Care

HB 580, sponsored by Rep. Douglas Reichley (R-Lehigh), amends the

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Public Welfare Code further providing for verification of eligibility for medical assistance. Under the bill, DPW shall issue a report to the attorney general within 30 days of issuing payment to a health care provider if the recipient of those services is a known or suspected illegal immigrant.

HB 1435, sponsored by Rep. Daylin Leach (D-Montgomery), amends Title 20 (Decedents, Estates and Fiduciaries) providing for procedures regarding the request and dispensation of lethal medication to patients seeking to die in a dignified and humane manner. The bill creates a new chapter entitled "Death With Dignity," which provide that any Pennsylvania resident who is capable and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner in accordance with this chapter. The bill provides for form of written request, attending physician responsibilities, consulting physician confirmation, counseling referral, informed decision, family notification, written and oral requests, right to rescind request, waiting periods, medical record documentation requirements, residency requirement, reporting requirements, effect on construction of wills and contracts and insurance or annuity policies.

HB 1498 and **SB 848**, identical bills sponsored, respectively by Rep. Anthony DeLuca (D-Allegheny) and Sen. Jane Orie (R-Allegheny), and **SB 602**, also sponsored by Sen. Orie, create the One Pennsylvania Act. The Act establishes One Pennsylvania, a phar-

macy benefits consolidation program, which shall administer all commonwealth prescription drug plans through an integrated system of plan administration using uniform standards and requirements for pharmacy reimbursement.

HB 1811, sponsored by Rep. Keith Gillespie (R-York), amends the State Lottery Law, further providing for PACENET eligibility by adding that the minimum and maximum income levels shall be adjusted annually to reflect the maximum annual Social Security cost-of-living adjustment. Each year's adjustment shall be based on the prior year's adjusted minimum and maximum income levels. The adjustment required under this paragraph shall reflect calendar years 2003, 2004, 2005 and each calendar year thereafter. The bill would be retroactive to Dec. 1, 2005. **SB 1170**, sponsored by Michael Waugh (R-York), is exactly the same as HB 1811 except that the adjustment required shall reflect calendar years 2003, 2004, 2005, 2006 and each calendar year thereafter. **HB 2274**, sponsored by Rep. Chris King (D-Bucks), amends the state Lottery Law providing that as of Dec. 31, those enrolled in the PACE or PACENET program shall remain program eligible if the maximum income limit is exceeded due solely to a Social Security cost-of-living adjustment. Eligibility in the program pursuant to this provision expires on Dec. 31, 2010. **HB 2345**, also sponsored by Rep. King, is similar, amending the same law, providing that: (1) as of Dec. 31, those enrolled in the PACENET program shall remain program eligible if the maximum income limit is exceeded due solely to a Social Security cost-of-living adjustment; and (2) as of Dec. 31, 2008, those enrolled in the PACE program shall remain program eligible if the maximum income limit is exceeded due solely to a Social Security cost-

of-living adjustment Eligibility in the PACE or PACENET program pursuant to this provision expires on Dec. 31, 2010.

SR 205, sponsored by Sen. Orie, directs the Legislative Budget and Finance Committee to prepare a report on the mental health system for older adults in Pennsylvania.

SR 246, sponsored by Sen. Edwin Erickson (R-Delaware), designates Apr. 16, 2008, as "Healthcare Decisions Day" in Pennsylvania and encourages all families to discuss end-of-life decisions and to consider executing advance health care directives. The resolution was adopted by the Senate 47-0 on Mar. 17, 2008.

Juries and Seniors

HB 688, sponsored by Rep. Paul Costa (D-Allegheny), amends Title 42 exempting persons older than 70 from jury duty. The bill passed the House 191-3 on Apr. 23, and received second consideration in the Senate on May 22. Similarly, **SB 628**, sponsored by Sen. Greenleaf, amends Title 42 exempting persons at least 75 who request to be excused from jury duty. **HB 826**, sponsored by Rep. Babette Josephs (D-Philadelphia), amends Title 42 by providing that parents or guardians of a child six or younger and have custody of and are the primary caregivers of the child, parents or guardians of a child who is of school age and who have custody of and are providing instruction to the child who has been excused from compulsory attendance at a school or special education program and primary caregivers of an elderly or disabled family member shall be exempt or excused from jury duty.

Real Property Taxes

HB 93, sponsored by Rep. Rosita Youngblood (D-Philadelphia), amends

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the act entitled "An act implementing the provisions of section 2(b) (ii) of Article VIII of the Constitution of Pennsylvania by authorizing cities of the first class to provide for special tax provisions relating to real property taxes for certain persons who meet the established standards and qualifications for age and poverty," further providing for construction, for declaration of policy, for definitions and for special tax provisions; and providing for limitations on refunds or forgiveness. The bill provides that Philadelphia is required (presently authorized) to provide by ordinance for the implementation of the special tax provisions contained in the act, which allow for the refund or forgiveness of real property tax liability of certain taxpayers, limited to 25 percent of the state allocation for the fiscal year of such refunds or forgiveness as certified by the Department of Revenue. **HB 935**, sponsored by Rep. Cherelle Parker (D-Philadelphia), amends the same act, further defining "low-income taxpayer" as a taxpayer whose income does not exceed the maximum annual income allowable for an eligible claimant to participate in the commonwealth's program for pharmaceutical assistance for the elderly needs enhancement tier, pursuant to Chapter 5 of the State Lottery Law.

HB 938, sponsored by Rep. W. Curtis Thomas (D-Philadelphia), amends the First and Second Class County Property Tax Relief Act further providing for deferral or exemption authority by adding that a school district of the first class (Philadelphia) shall have the authority to determine its participation in this program within its taxing jurisdiction. Financial need or age, or both, of the longtime owner-occupant may be used to determine eligibility in a county of the first class.

HB 1225, sponsored by Rep. Tim Seip (D-Schuylkill), the Local Senior Citizen Property Tax and Rent Rebate Act authorizes a local taxing authority to establish a local senior citizen property tax and rent rebate program or continue an existing program. A program established under this act shall expire one year from the date of establishment. Income eligibility and the maximum amount of property tax and rent rebates shall be determined by the local taxing authority as follows: (1) the maximum annual household income for property tax rebates shall not exceed \$35,000, and the annual rebate may be any amount up to and including the amount of the maximum rebate under § 1304 The Taxpayer Relief Act; and (2) the maximum annual household income for rent rebates may not exceed \$15,000, and the annual rebate may be any amount up to and including the amount of the maximum rebate under § 1304. Approved claims shall be paid from the local taxing authority's general fund. Local taxing authorities are required to report on the program to the Department of Community and Economic Development (DCED). The bill provides for DCED's duties.

HB 1987, sponsored by Rep. Stephen Barrar (R-Delaware), the Senior Citizens Property Tax Freeze Act, provides, notwithstanding the provisions of any other law, that any claimant who meets the eligibility requirements contained in the act shall be entitled to a real estate tax freeze on the homestead and may not be required to pay any increase in property taxes in excess of the claimant's base payment. The claimant or the claimant's spouse must be the homestead owner; while the claimant must be during a calendar year or part thereof in which real property taxes were due and payable: at least 65, a widow or widower at least 50; or a permanently disabled person at least 18. A tax freeze shall remain in

effect upon the transfer of the affected real property to a surviving spouse who, at the time of death of the claimant, is at least 50 or will be 50 within six months. Otherwise the tax rate on and the assessment of any real property taxes shall become current on the sale or transfer of that real property, including any transfer under a recorded real property sales contract. (Note also **SB 80**.)

HR 169, sponsored by Rep. John Siptroth (D-Monroe), directs the Legislative Budget and Finance Committee to study the feasibility of a local property tax freeze and the gradual elimination of such taxes for senior citizens; perform a cost analysis of such a freeze and reduction; determine the consequences of such a freeze and reduction on local taxing bodies and the commonwealth; and make recommendations on alternative financing methods for school districts.

Tax, Generally

HB 1444, sponsored by Rep. Kerry Benninghoff (R-Centre), amends the Tax Reform Code further providing for the imposition of inheritance tax, for the rate of inheritance tax and for returns by providing for the phase out or reduction of the inheritance tax. (Note also **HB 409** and **SB 417**.)

HB 1808, sponsored by Rep. William Adolph, Jr. (R-Delaware), amends the Taxpayer Relief Act, further providing for the definition of "income" by adding that it includes 50 percent of railroad retirement benefits for calendar years 1999 through 2002 (presently 1999 and thereafter), and 50 percent of all benefits received under the Social Security Act (SSA), except Medicare benefits, for calendar years 1999 through 2002 (presently 1999 and thereafter). For calendar years 2007 and thereafter, "income" would not include 50 percent of all benefits

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received under the SSA (except Medicare benefits) and 50 percent of any Social Security substitute pension. "Social Security substitute pension" is defined. Relatedly, **SB 1046**, sponsored by Sen. Patricia Vance (R-Cumberland), amends the same Act by amending the definition of "income" to exclude 50 percent of Social Security substitute pensions for calendar years 2007 and thereafter and to exclude veterans' disability payments; and defining "Social Security substitute pension" as a pension that is provided in lieu of old age and survivor benefit payments under the SSA to a person whose employment was not covered under the SSA. The amount of the pension that qualifies as a Social Security substitute pension shall not exceed the maximum federal old-age and survivor benefit payments, less any federal old-age and survivor benefit payments received under the SSA for employment covered under the SSA.

Trusts, Estates, and Wills

HB 955, sponsored by Rep. Craig Dally (R-Northampton), amends Title 20 by providing that the Secretary of State shall create and maintain a will registry in which a testator or the testator's attorney may register information regarding the testator's will.

HB 1031, sponsored by Rep. Bob Bastian (R-Somerset), amends Title 20 further providing, in dispositions independent of letters, for payments to family and funeral directors by adding motor vehicle transfers to the scope and making related editorial changes. The maximum total standing credit that may be paid is increased to \$10,000 (from \$3,500). The title of a motor vehicle owned by a decedent and that has a fair market value of less

than \$15,000 shall be transferred by PennDOT at any time after the death of that owner to the spouse, any child, the father or mother or any sister or brother (preference being given in the order named) of the deceased, whether or not a personal representative has been appointed.

SB 1203, sponsored by Sen. Greenleaf, amends Title 20 further providing for forfeiture, for modification of wills, for advertisement of grant of letters, for enforcement of contribution or exoneration of federal estate tax, for implementation of power of attorney, for applicability of rule against perpetuities, for modification of conveyance by divorce, for effect of divorce on designation of beneficiaries, for notice of representation, for creditor's claim against settlor, for actions contesting validity of revocable trusts, for claims and distribution after settlor's death, for trustee's duty to inform and report, for illustrative powers of trustee, for limitation of action against trustee, for power to convert to unitrust and for retirement benefits, individual retirement accounts, deferred compensation, annuities and similar payments; and making conforming amendments to Title 15 (Corporations).

Miscellaneous

HB 305, sponsored by Rep. Mundy, amends the HCFA further providing for definitions, for powers and duties of DoH, for state health services plan, for regulations, for certificates of need and for sunset; and prohibiting certain referrals and claims of payment.

HB 361 and **SB 1049**, sponsored, respectively, by Rep. Matthew Baker (R-Tioga), and Sen. Vance, create the Adult Protective Services Act, which provides for protection of abused, neglected, exploited or abandoned adults; establishes a uniform statewide reporting and investigative system for sus-

pected abuse, neglect, exploitation or abandonment of adults; provides for protective services; and prescribes penalties.

HB 1020, sponsored by Rep. Dave Reed (R-Indiana), the Older Pennsylvanian Higher Education Program Act, establishes the Older Pennsylvanian Higher Education Program to authorize institutions of higher education to develop a program for older adults to enroll in higher education courses tuition-free. Each institution of higher education that chooses to participate in the program shall promulgate specific guidelines regarding procedures and administration of the program, including, but not limited to, the following: (1) admitting participating older adults; (2) determining the availability of higher education courses; (3) determining if the program will be for credit, noncredit, certification, degree or enrichment; (4) disseminating to the local AAA a complete program description and technical assistance that explains the process of admission and availability of enrolling in higher education courses offered by the higher education institution; (5) coordinating with the local AAA to publicize and advertise the program; and (6) outlining course rules and responsibilities for participating older adults.

HB 1548, sponsored by Rep. Bill Kortz (D-Allegheny), amends Title 42 (Judiciary) further providing for disposition of dependent child by providing that if the court determines that temporary or permanent physical and legal custody would be given to an individual or entity other than a child's parents, guardian or other custodian, a grandparent who wishes to be given custody shall be considered and a study done by the probation officer or other person or agency designated by the court. A grandparent who wishes

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to be given custody shall have standing in any court proceeding under this chapter involving the child or children. The bill passed the House 181-11 on Oct. 29, and was then referred to the Senate Judiciary Committee.

HB 1743, sponsored by Rep. John Bear (R-Lancaster), the Pennsylvania Retiree Mentoring Works Demonstration Program Act, establishes the Pennsylvania Retiree Mentoring Works Demonstration Program, a welfare-to-work mentoring demonstration program, to provide mentoring services to assist clients find and retain employment. DoA shall select retired individuals who are at least 60 to serve as mentors in the program. The mentors shall assist clients in removing barriers that have been major obstacles to finding and retaining quality employment in rural, urban and suburban regions of Pennsylvania. The bill outlines DoA's powers and duties, including to annually report to the General Assembly. Retiree mentors shall serve as advisors, counselors and teachers to clients in one-on-one scenarios where they cover topics, including, but not limited to, job-seeking and job-keeping skills, work ethic and responsibility as a trusted employee. The program ends three years from the date of implementation.

HB 1794 and **SB 126**, sponsored, respectively, by Rep. R. Taylor, and Sen. Greenleaf, amend the Mobile Home Park Rights Act. Among other things, the bills require that any rent increase to a senior resident may not exceed the annual Social Security cost-of-living adjustment approved by the Social Security Administration for that calendar year. SB 126 adds that if a majority of the residents of a com-

munity believe the rent increase is excessive they may request the resident association's governing board to submit a written request to the American Arbitration Association for the appointment of an arbitrator to determine whether the increase in rent is excessive.

SB 574, sponsored by Sen. Greenleaf, amends the Administrative Code by authorizing DoH to develop a program for providing respite service programs to persons suffering from Alzheimer's disease or related disorders of aging. Respite and related services may include: (1) diagnostic and evaluation programs; (2) daycare centers; (3) temporary care in nursing or boarding homes of other institutions; or (4) in-home visiting or temporary nursing services.

SB 1307, sponsored by Sen. Jacob Corman, III (R-Centre), amends The Insurance Company Law of 1921 providing for suitability of annuity transactions. The bill provides for the duties of insurers and insurance producers by providing that in making a recommendation to a consumer for the purchase of an annuity or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, the insurance producer shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to the consumer's investments and other insurance products and as to the consumer's financial situation and needs. This requirement applies to any recommendation to purchase or exchange an annuity made to a consumer by an insurance producer. The bill provides for penalties and remedies for violations. (Note also **HB 1584**.)

SB 1289, sponsored by Sen. Stack, the Naturally Occurring Retirement Community Act, requires DoA to establish and administer the Naturally Occurring Retirement Community Program. The bill provides for the creation of an advisory board. DoA shall issue grants to eligible entities, developing criteria for awarding, said criteria to include at a minimum: (1) the number, size, type and location of the projects to be served; (2) the appropriate number and concentration of senior citizens to be served by an individual project; (3) the demographic characteristics, including the age, sex and region of the senior citizens to be served; (4) the financial support required to operate a naturally occurring retirement community project and the sources of the support; (5) the scope and intensity of the services to be provided, and their appropriateness for the senior citizens proposed to be served; (6) the experience and financial stability of the eligible entity, except that the criteria shall require that priority be given to programs already in operation; (7) the nature and extent of requirements established for active, meaningful participation for senior citizens to be served in project design, implementation, monitoring, evaluation and governance; and (8) documentation of the need for the project and financial commitments to it from such sources as the advisory board shall deem appropriate given the character and nature of the proposed project. The bill provides for annual reports to the General Assembly and appropriates \$5 million to DoA to administer, distribute and fund grants for naturally occurring retirement communities. ■