Re-Thinking Filial Support Laws In A Time Of Medicaid Cutbacks—Effect Of Pennsylvania's Recodification Of Colonial-Era Poor Laws

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INTRODUCTION

During a summer of public outcry over legislative pay increases, two cost allocation provisions with the potential to impact family finances were quietly signed into Pennsylvania law. The first provision, Act 42,[1] amends Pennsylvania's Public Welfare Code to limit the availability of public financing for nursing home and home-based care. The second, Act 43,[2] moves a frequently overlooked provision[3] from colonial era poor laws into a central position within Pennsylvania's modern Domestic Relations Code, thus supplementing the current support laws by providing authority for courts to determine support obligations among adult family members. In a technical sense, these two provisions are not related except by coincidence in numbering and their July 7 passage dates. As indications of a possible trend in public policy on financing for long term care, especially for the elderly, however, the timing of these two pieces of legislation appears to be highly symbolic.

PENNSYLVANIA'S ACT 42—LIMITING AVAILABILITY OF MEDICAID BENEFITS

A brief tutorial on Medicaid provides context for the most recent changes, as well as sug-

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 Special thanks go to Elizabeth Mattern for her excellent, timely research help.

[1] Act 42 (H.B. 1168), 2005 PA. LAWS 123-137 (Session Laws) amending multiple sections of the Public Welfare Code, enacted July 7, 2005, to take effect "immediately."

[2] Act 43 (S.B. 86), 2005 PA. LAWS 138 (Session Laws) to be codified as 23 PA. CONS. Stat. §§4601-4606 (July 7, 2005) (comprising Chapter 46 of the Domestic Relations Code on "Support of the Indigent"). Hereafter, citations to the recodified statute refer to the numbering used in 23 Pa.C.S.A. §§4601 *et seq.*, rather than the Act.

[3] 62 PA. STAT. ANN. §§1971-1976 (entitled "Support of the Poor by Relatives," repealed July 7, 2005). This statute, while amended several times, can be traced to 1937, with its antecedents in the Colonial Laws of Pennsylvania 1705-6, ch. CLIV, §II, at 251-253. Such familial or "filial" responsibility statutes came to the colonies from England, influenced by the Elizabethan Poor Laws of 1597 and 1601. *See* Daniel R. Mandelker, *Family Responsibility Under the American Poor Laws*, 54 MICH. L. REV. 497 (1956) (noting that as of the time of his article "practically all the states still have family responsibility provisions based on the English model"). Beginning in the 1950's, many American states repealed their laws. *See* Terrance Klein, *A Rational Role for Filial Responsibility Laws in Modern Society?* 26 FAM. L. Q. 195, 196 (1992) (noting that by 1992 the number of U.S. states retaining such laws had dropped from as many as 45 to as few as 28).

gesting the likelihood of future changes. Since 1965, under Title XIX of the Social Security Act, Medicaid has provided federal tax revenues for matching with state tax revenues to provide a wide range of health related services for persons who are elderly (age 65 or older), blind or disabled, and who have very limited income and minimal financial assets. During the most recent fiscal year, Medicaid programs "financed about $93 billion for long-term care services" across the nation.[4]

In Pennsylvania, Medicaid is called "Medical Assistance"("MA") and consistent with the national trend, it has been a significant source of coverage for long-term care, including care provided in nursing homes and in some instances, for home and community-based care.[5] Applicants must establish both financial and medical eligibility. For example, Pennsylvania generally permits a medically-qualified individual no more than $2,000 in countable assets, with the individual's home treated as a non-countable asset if there is an expectation of returning home or there is a community spouse or dependent still living in the residence.[6] For individuals who qualify for MA, Pennsylvania pays the difference between the nursing facility's charge for providing care and the amount that the individual is required to pay from his or her monthly income toward the cost of nursing facility care.[7] Where the covered individual has a community spouse, Pennsylvania (as does every other state) permits community spouses to keep some portion of the couple's income and assets, and for certain low income spouses there are special calculations used to reduce the potential for "impoverishment" of the community spouse.[8]

Periodically, especially during budget crunches, there are calls for federal savings on benefit programs, including Medicaid.[9] Early in 2005, President Bush responded to projected budget deficits by calling for "$10 billion" in savings focused on Medicaid.[10]

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[4] U.S. GENERAL ACCOUNTING OFFICE, MEDICAID REPORT TO CONGRESSIONAL REQUESTERS ON TRANSFERS OF ASSETS BY ELDERLY INDIVIDUALS TO OBTAIN LONG-TERM CARE COVERAGE, PUBL'N NO. GAO-05-968, at Highlights Page, (September 2005), available at www.gao.gov/cgi-bin/getrpt?GAO-05-968 (last visited Oct. 4, 2005) (hereafter "GAO TRANSFER REPORT").

[5] For a succinct and helpful text on a major aspect of MA in Pennsylvania, *see* ROBERT C. GERHARD, PENNSYLVANIA MEDICAID: NURSING HOME CARE (Bisel 2004).

[6] Medicaid begins with a complicated federal umbrella of statutes and regulations that overlay state administered plans. *See* 42 U.S.C. §§1396-1395v (Medicaid Act) and 42 C.F.R. §§430.0 *et seq.* The federal administering body is currently called the Centers for Medicare and Medicaid Services (CMS), formerly called the Health Care Financing Agency (HCFA). There is enormous variation from state to state, and the menu of offerings within a state is often highly complex, making Medicaid programs and related public assistance programs difficult to summarize. Pennsylvania's Department of Public Welfare administers the Commonwealth's plan for Medical Assistance to the elderly. *See* 62 P.S. §§441.1 *et seq.* and 55 PA. CODE §§101.1. Some aspects of Pennsylvania's programs and eligibility rules are described on-line. *See* e.g., www.dpw.state.pa.us. Unfortunately many critical details are found outside the formal rule-making process and are frequently contained in difficult to obtain "operating" handbooks, memos and guidelines that are not available on-line. *See* e.,g., the MEDICAL ASSISTANCE ELIGIBILITY HANDBOOK AND THE NURSING CARE HANDBOOK, developed and issued by the Office of Income Maintenance of the Pennsylvania Department of Welfare for county assistance office (CAO) workers with directions for handling MA application and coverage issues. The propriety of important but "informal" agency procedures has sometimes resulted in successful legal challenges. *See* e.g., *Dept. of Environmental Resources* v. *Rushton Mining Co.*, 591 A.2d 1168 (Pa. Comwlth. 1991).

[7] *See* Pennsylvania DPW's on-line information on general eligibility for nursing facility care under MA at http://www.dpw.state.pa.us/LowInc/Med Assistance/MAEligibility/003670307.htm (last visited Oct. 2, 2005). In certain instances, MA pays for home based cared under a "waiver"-based program.

[8] *See Wisconsin Dept. of Health & Family Services* v. *Blumer*, 534 U.S. 473 (2002) (analyzing Wisconsin's plan for avoiding impoverishment of the community spouse, known as an "income-first" approach).

[9] In 1988, one author commented on the federal government's response to the then-perceived budget crisis. "With a continuing increase in the reduction of federal aid to the states over the past several years, rising pressure has been placed on the states to find alternative sources of funding for programs which previously were primarily funded by the federal government. That pressure has been multiplied by skyrocketing medical costs and an increasing elderly population. The Medicaid program . . . is one such [targeted] program." *See* e.g., George F. Indest, *Legal Aspects of HCFA's Decision to Allow Recovery from Children for Medicaid Benefits Delivered to their Parents Through State-Financial Responsibility States: A Case of Bad Rule Making Through Failure to Comply With the Administrative Procedures Act*, 15 SO. U. L. REV. 225 (Fall 1988).

[10] "With Congress poised [prior to Hurricane Katrina] to make budget cuts next month, AARP is

Pennsylvania's own budget woes also required state legislators to respond to the Governor's call for cutbacks.

Against this backdrop of federal and state budget concerns, Act 42 makes a number of changes in Pennsylvania's rules for determining eligibility for MA, such as changing the ways in which "spend-downs" for medical expenses are calculated to reach eligibility,[11] and providing greater "penalty periods" for less-than-fair-market transfers of assets.[12]

Two provisions of Act 42 may prove particularly significant for low income families facing long-term care decisions. Pursuant to federal authority permitting states to adopt "income-first" or "resource-first" calculations to better protect community spouses from impoverishment arising from payment for their spouse's long-term care, since 1996 Pennsylvania has followed a "resource-first" approach as a result of a settlement of a class action case known as the *Hurly* case.[13] Pennsylvania's resource-first approach permitted the low-income community spouse to keep a greater share of the couple's assets using a calculation based on commercially available annuity rates, but without requiring the community spouse to purchase the actual annuity.[14] Act 42 requires a spouse who wants to use the "resource-first" approach to actually purchase the commercial annuity, naming the Department as a contingent beneficiary.[15] Pennsylvania's private bar of elder law specialists widely view this requirement as tying the community spouse to an inflexible commercial product, potentially resulting in community spouses choosing to waive the benefits of the resource-first approach to anti-impoverishment planning.

In addition, Act 42 makes changes to the calculation of eligibility for home and community based care services, matching the stricter eligibility criteria to those already in place for nursing home care,[16] thus saving tax money—but also perhaps reducing the incentive for the community spouse to keep the more disabled partner at home. Further, the eligibility restriction was imposed even on persons who had already qualified for the home services, thus declining to grandfather-in families relying on public assistance in keeping a care-dependent loved one at home.

Act 42 impacts families, particularly modest to low income community spouses, in responding to anticipated costs for long-term care. In recent weeks, representatives of the Elder Law Section of the Pennsylvania Bar Association met with House and Senate members from both sides of the aisles to address concerns and to request postponement of certain provisions to permit determination of any projected savings as compared to individual hardships.[17] Some legislative members and their staffers were sympathetic and described the tension between a desire, on the one hand, to continue public assistance aimed at quality care and a need, on the other hand, to save public dollars. Others expressed their strongly-held opposition to *any* form of "Medicaid-planning." The careful allocation of funds—"Medicaid planning"—can frequently maximize the community spouse's ability to use income and resources for his or her own independent living, while accelerating the date of eligibility for MA for the care-dependent spouse[18] and such planning is part of the approach contemplated by the federal legislators

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lobbying Medicaid committee leaders to look to drug pricing and long-term care reforms to help fund the $10 billion reconciliation target." *AARP Weighs in on Medicaid Cuts*, INSIDE CMS, August 11, 2005, *available at* 2005 WLNR 12626175 (Westlaw News Release Database).

[11] Act 42 at Section 441.3, addressing "Use of Medical Expenses to Establish Medical Assistance," to be codified as 62 P.S. §441.3.

[12] Act 42 at Section 441.5, "Addressing Penalty Period for Asset Transfer," to be codified as 62 P.S. §441.5. The Bush Administration recently announced plans for additional savings through restrictions on transfers, by moving the beginning date for any penalty period to the *later* of the date of an asset transfer, or the date on which the individual applies for Medicaid. *See* GAO TRANSFER REPORT, *supra* note 4, at page 3.

[13] *Hurly* v. *Houston*, Case. No. 93-3666 (E.D. Pa. 1996) (unpublished settlement agreement). For a helpful summary of the Hurly settlement, *see* GERHARD, *supra* note 4 at §3.4

[14] *Id.*

[15] Act 42, at Section 441.7, to be codified as 62 P.S. §441.7.

[16] Act 42, at Section 441.8, to be codified as 62 P.S. §441.8.

[17] As of the date of this article, the Department of Public Welfare was preparing for immediate implementation, with an operations memorandum to County Assistance Offices setting October 1, 2005 as the start date.

[18] For example, the home, an automobile, and prepaid burial plots or reserves are non-countable resources, and Medicaid planning permits maximizing these resources.

as protecting the community spouses from complete impoverishment.[19] But, Medicaid planning has a controversial, at times even notorious, reputation.[20] As one government report notes, "[i]n some cases, individuals might transfer assets to spouses or other family members to become financially eligible for Medicaid."[21] However, individuals who transfer countable assets for less than fair market value prior to applying for Medicaid are penalized under a detailed statutory scheme that denies coverage for specified periods of time—and the ineligibility or "penalty" periods have been increasing, even prior to 2005.[22] Still, there are persistent—and seemingly undocumented—tales of "millionaires" who wrongfully qualified for millions of dollars in Medicaid benefits.[23] Such rumors previously helped to fuel a short-lived federal attempt to criminalize certain aspects of Medicaid-planning advice.[24] Countering such images are reports[25] that suggest Medicaid-planning is largely an approach taken by persons of comparatively modest means, leading some to observe that the completely destitute don't need Medicaid planning and the truly wealthy don't want it.[26]

PENNSYLVANIA'S ACT 43—FILIAL RESPONSIBILITY FOR SUPPORT

Thus, as demonstrated by Act 42, during the summer of 2005 Pennsylvania tightened the

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[19] *Wisconsin Dept. of Health & Family Services*, v. *Blumer*, 534 U.S. 473 (2002) (interpreting spousal impoverishment provisions and noting Congress' attempt to ameliorate "unintended consequences" of a change in the Medicaid rules that counted joint incomes in determining Medicaid eligibility that potentially led to destitution of the community spouse).

[20] On September 7, 2005, for example, the Cato Institute of Washington D.C. hosted a policy debate on "Medicaid and the Long Term Care Crisis—Who Should Pay?" with opposing perspectives articulated by Stephen Moses, President of the Center for Long-Term Care Reform, Inc., and Vincent Russo, former President of the National Academy of Elder Law Attorneys. *See* http://www.atlasusa.org/calendar/details.php?refer=calendar&id=1030 (Cato Institute Website, last visited October 3, 2005).

[21] GAO TRANSFER REPORT, *supra* note 4, at "Highlights" page.

[22] *See* e.g., 42 U.S.C. §1396p(c)(1)(D) & (E) and 55 PA. CODE §178.104(d).

[23] In September 2005, the U.S. General Accounting Office issued a report in response to Congressional inquiries looking at current data on transfer of assets. GAO reviewed "(1) the level of assets held and transferred by the elderly, (2) methods used to transfer assets that may result in penalties, (3) how states determined financial eligibility for Medicaid long-term care, and (4) guidance . . . [CMS] has provided states regarding the treatment of asset transfers." GAO TRANSFER REPORT, *supra* note 4, at "Highlights" page. The report found that in 2002, "over 80 percent of the approximately 28 million elderly households (those where at least one person was aged 65 or older) had annual incomes of $50,000 of less, and about one-half had nonhousing resources, which excluded the primary residence, of $50,000 or less. About 6 million elderly households (22 percent) reported transferring cash, with amounts that varied depending on the household's income and resource levels." *Id.* A chart prepared by GAO shows median and average figures for reported transfers, ranging from a "low" average of $4,000 for elderly households with yearly income of less than $24,200 and non-housing resources of less than $51,500, to a "high" average figure of $12,000, for households with greater than $24,200 in yearly income and greater than $51,500 in non-housing resources. The report notes CMS's own description of the "complexity of the current law" and CMS's observation that "data on the precise extent and cost of assets transfers to the Medicaid program have been difficult to gather." *Id.*

[24] *See* the Balanced Budget Act of 1997, at 42 U.S.C. §1320a-7b(a)(b) (2004). *But see New York State Bar Association* v. *Janet Reno*, 999 F.Supp. 710 (N.D. N.Y. 1998) (holding the criminalization attempt to be an unconstitutional violation of the First Amendment's protection for free speech, resulting in injunctive relief).

[25] In June of 2005, the Kaiser Family Foundation, a non-profit private foundation focusing on major health care issues, issued a report on Medicaid and the uninsured that responded to concerns that assets that could be tapped to pay for long term care were being transferred to children or grandchildren, thus unfairly shifting the burden from private to public sectors. The prospective study concluded, "The vast majority of elderly people at high risk for nursing home use do not have assets to cover one year in a nursing home . . . [T]hese findings suggest that proposals that assume significant reductions in Medicaid spending in the short-term by lengthening the look-back period beyond three years or tightening asset transfer rules may fall short of expectations." Barbara Lyons et al., The Distribution of Assets in the Elderly Population Living in the Community, Kaiser Family Commission Study Publication No. 7335, pages 4-6, published June 6, 2005, available at www.kff.org (last visited October 1, 2005).

[26] *See* Alison Barnes, *An Assessment of Medicaid Planning*, 3 HOUSTON. J. HEALTH L. & POL'Y 265, 269 (2003) (exploring pro and con perspectives on Medicaid planning, including "some recognition that Medicaid long-term care is no longer a welfare benefit, but rather an entitlement for the prudent middle class").

budget belt another notch by focusing on Medicaid funding. At the same time Pennsylvania moved the possibility of family liability for matters such as daily living expenses, health care and long-term care from a metaphorical back closet to center stage. Act 43 shifts the key language from the welfare code to the domestic relations code, specifying that **"all of the following individuals have the responsibility to care for and maintain or financially assist an indigent person":**

(i) The spouse of the indigent person.
(ii) The child of the indigent person.
(iii) The parent of the indigent person.[27]

Parents already have well recognized, legally enforceable obligations to provide support for minor children[28] and, in certain instances, spouses are obligated to pay for each others' "necessaries."[29] Portions of Act 43 impacting on child or spousal support seem redundant and potentially confusing.

The more interesting—and potentially controversial—aspect of Act 43, however, is its revitalization of a mostly dormant statutory support obligation running from parents to adult children—and from adult children to parents. The idea of "filial" support obligations running between adult children and parents is frequently described in case law and commentary as inconsistent with the common law tradition and contrary to the notion of legal "emancipation" at age of majority.[30] Pennsylvania courts have observed that "[a]t common law, an adult child has no duty or obligation to contribute to the support of his parents. Thus, whatever duty rests on a child to support an indigent parent is imposed solely by contract or statute."[31]

The trigger for the filial care or financial support obligation is the "indigency" of the spouse, child or parent. Indigency, however, is not defined by either the original law or the recodification. In older case reports, status as an indigent or "poor person" or "pauper" was frequently interpreted as meaning "one so poor that he must be supported at public expense."[32] However, in 1945 the act was amended to specify the indigent's right to family support "whether a public charge or not," and the court's definition of indigency began to expand.[33] An "indigent person" was not necessarily one who is "completely destitute and helpless."[34] In 1981, the Pennsylvania Superior Court observed that status as an "indigent" under the statute did *not* require the person to be "helpless" *nor* in "extreme want, [or] so completely destitute of property, as to require assistance from the public [welfare]."[35]

Both the earlier-era version and the recodified version of Pennsylvania's filial responsibility law have limited defenses available to the family member who is unwilling to assume the financial responsibility for another. There are two express statutory defenses: first, a family member is not liable if the "individual does not have sufficient financial ability to support the indigent person,"[36] and second, the adult "child shall not be liable for the support of a parent who abandoned the child and persisted in the abandonment for a period of ten years during the child's minority."[37] While being of "insufficient financial ability" at first blush

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[27] 23 Pa.C.S.A. §4603(a)(2).

[28] 23 Pa.C.S.A. §4321(2) (2001), providing "Parents are liable for the support of their children who are unemancipated and 18 years of age or younger."

[29] *See* e.g., 23 Pa.C.S.A. §4102 (2001), providing for "Proceedings in case of debts contracted for necessaries." *Compare* 23 Pa.C.S.A. §4321(a), providing "Married persons are liable for the support of each other according to their respective abilities to provide support as provided by law."

[30] Ordinarily in Pennsylvania, a parent is not liable for support of an "emancipated" child. *See* 23 Pa.C.S.A. §4323 (2001). *But see* 23 Pa.C.S.A. §4321(3) (2001) providing that "Parent may be liable for the support of their children who are 18 years of age or older" (emphasis added). *See also Gaydos* v. *Domabyl*, 152 A. 549 (Pa. 1930) (noting that exception to general rule of emancipation, "if the child was incompetent when he reached the age of 21 and lived with his parents, they would be obliged to provide maintenance at common law").

[31] *Albert Einstein Medical Center* v. *Forman*, 243 A.2d 181, 183 (Pa. Super. 1968).

[32] Case of Rising, 29 York 146 (1915). *See also Directors of the Poor* v. *Hickman*, 4. Dist. 494 (1895).

[33] Act 1945, P.L. 865. *See also* Act 1945, P.L. 864, deleting "grandparent and grandchild" from the list of relatives liable for support.

[34] *Com. ex. Rel Home for the Jewish Aged* v. *Kotzker*, 118 A.2d 271, 273 (Pa. Super. 1955) (imposing monthly support duty on adult child for father who received Social Security and charity from Jewish home).

[35] *Verna* v. *Verna*, 432 A.2d 630, 633 (Pa. Super. 1981) (ordering father to pay $50 per month towards adult daughter's medical expenses).

[36] 23 Pa.C.S.A. §4603(a)(2)(i).

[37] 23 Pa.C.S.A. §4603(a)(2)(ii).

appears to be a significant escape hatch,[38] especially for modern adults accustomed to a lifestyle heavily encumbered by home mortgages and credit card debt, a review of reported cases suggests some courts' unwillingness to accept technical or superficial assertions of insolvency as a defense.[39] In the fairly recent case of *Savoy* v. *Savoy*, Pennsylvania's Superior Court affirmed the trial court's order requiring the son to pay monthly sums toward his mother's health care debts despite evidence that suggested the adult son's expenses exceeded his monthly income, where the son had taken over the family's business.[40]

Unlike child support cases where there are published guidelines for parental obligations, the dollar calculation of any financial support obligation under Act 43 will likely be case specific and dependent on the trial judge's response to the comparative assertions of hardship. In the recodification effort, minor wording changes were effected to bring the predecessor statute, Section 1973, into compliance with the modern court system for purposes of court jurisdiction issues. However, the financial allocation provisions of the older law were imported virtually word for word, providing in paragraph (1) that "except as set forth in paragraph (2) the amount of the liability [for support] shall be set by the court in the judicial district in which the indigent person resides."[41] This open wording appears to give the trial court great leeway in assessing the appropriate figure for a support order.[42] In paragraph (2), the discretion of the court is reined in when assessing the family member's liability for "medical assistance for the aged other than public nursing home care."[43] The calculation then becomes the lesser of "six times the excess of the liable individual's average monthly income over the amount required for the reasonable support of the liable individual and other person's dependent upon the liable individual" or " the cost of the medical assistance for the aged."[44]

The revived indigent support statute provides "contempt" powers, authorizing the court to imprison a defaulting family member for up to six months "if the court determines the individual liable for support has intentionally failed to comply" with the court's order.[45] As with other provisions in the filial law, the contempt power exists "regardless of whether the indigent person is confined in a public institution," suggesting unpaid institutions such as hospitals and nursing homes may have a unique creditor's tool—threatening imprisonment for non-payment of their bills.[46] Petitions for support of an indigent person may be brought by the indigent person or "any other person or public body or public agency having any interest in the care, maintenance or assistance of such indigent person."[47]

While the core of most disputes would seem likely to center on the liability provisions of Section 4603, including the modernized but still awkward language and calculations for "medical assistance" for the "aged other than" those in "public nursing home care," the recodified statute also carries forward the prior law's rules for determining liability running against the indigent's personal property, and

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[38] *See* e.g., *Goodman* v. *Delara*, 281 A.2d 751 (Pa. Super. 1971) (holding "the amount of the order must be justified by the parent's present earning ability, making due allowance for his own reasonable living expenses,"noting that a support order cannot be based on mere speculation about earning ability, and recognizing "credibility" regarding income for purposes of calculating support orders under 62 P.S. §1973 is "certainly" for the trial court).

[39] *Americana Healthcare Center* v. *Randall*, 513 N.W. 2d 536 (S.D. 1994) (analyzing South Dakota's filial responsibility statute and recognizing support duty where even though son was unable to pay his mother's $36,000+ nursing home bill out of his own income, he could pay it out of the proceeds he received from distribution of his mother's maintenance trust following her death).

[40] *Savoy* v. *Savoy*, 641 A.2d 596 (Pa. Super. 1994).

[41] 23 Pa.C.S.A. §4603(b)(1).

[42] *See Goodman* v. *Delara*, 281 A.2d 751 (Pa. Super. 1971), discussed *supra* note 38.

[43] *Id.* at §4603(b)(2). As used in this provision, the phrase "medical assistance" appears to mean generalized health care expense (although it is not clear whether that would include long-term care expense, such as private facility costs), rather than "Medical Assistance" in the Medicaid sense of the word.

[44] 23 Pa.C.S.A. §4603(b)(2)(i). For example, assume an "indigent" aged parent has medical assistance needs, and assume a son's monthly income is $5,000 while his "reasonable" personal support expenses total $3,000 per month. The remaining $2,000, multiplied by 6, would give a figure of $12,000, which would appear to be the son's maximum liability during a 12 month period, *unless*, the "medical assistance" cost is actually less than $12,000. There is no definition of "aged" in the statute.

[45] 23 Pa.C.S.A. §4603(d)(1).

[46] 23 Pa.C.S.A. §4601(d)(2).

[47] 23 Pa.C.S.A. §4601(c).

for liens against real property or "proceeds" of causes of action.[48] Also contained within the recodified indigent support law is a guardianship provision,[49] that seems to overlap and provide opportunities for confusion with Pennsylvania's detailed formal procedures for guardianships.[50]

IMPLICATIONS ARISING FROM RECODIFICATION

While several states[51] in the nation continue to have—and occasionally enforce—filial provisions similar to Act 43, there appear to be significant concerns triggered by Pennsylvania's recodification effort.[52] In response to questions, some have suggested Act 43 was a merely a routine step in the on-going efforts to recodify Pennsylvania's many older provisions, with no new public policy implications.[53] Yet it also appears that Act 43 focuses on one comparatively small aspect of the Public Welfare code, without reorganizing or recodifying the rest of the public welfare provisions.

Some have suggested Act 43 is necessary to assist in "estate recovery" by the Department of Public Welfare, pursuant to federal Medicaid provisions that direct states to pursue reimbursement for public expenditures from the probate estates of the Medicaid beneficiary.[54] However, in 1994 Pennsylvania adopted a detailed set of provisions providing the Department with extensive—and profitable—means to obtain estate recovery and Section 43 does not appear to provide "estate recovery" measures in the usual sense of that phrase.[55]

It has been suggested that movement of the filial or family support provisions assigns them their "proper" place as part of a comprehensive family support network, making it easier for family members, potential family creditors and their attorneys to enforce the existing law and serving as a deterrence to fraud or abuse by financially manipulative family members. Supporters of filial responsibility laws point to the 2003 case of *Presbyterian Medical Center* v. *Budd*,[56] in which the Pennsylvania Superior Court analyzed a nursing home's claim against an adult daughter for her mother's unpaid nursing home bills totaling approximately $68,000. According to the opinion, after her mother was admitted to the facility, the daughter represented to the facility that she was applying for MA but instead the daughter transferred to herself more than $100,000 from her mother's bank accounts using a power of attorney.[57] The court concluded that the nursing home failed "to establish every element of its fraud claim with sufficient particularity,"[58] and that the nursing home did not have a valid claim under the Pennsylvania's adoption of the Uniform Fraudulent Transfer Act,[59] but the court also ruled that the nursing home had a cause of action for the daughter's liability under 62 P.S. §1973, the predecessor to Act 43.[60] The court concluded a "nursing home providing an indigent parent with shelter, sustenance, and care has sufficient 'interest' under 62 P.S. §1973 to bring a support action against the parent's child."[61]

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[48] 23 Pa.C.S.A. §4604.

[49] 23 Pa.C.S.A. §4606.

[50] *Compare* 20 Pa.C.S.A. §§5501-5555 (Guardianships).

[51] *See* e.g., articles described at note 3, *supra*, describing state trends in filial support laws.

[52] Pennsylvania's recodification effort may be part of what some see as a "renewed interest in filial responsibility laws." Alison Barnes, *An Assessment of Medicaid Planning*, 3 HOUSTON J. HEALTH L. & POL'Y 265, 277 (2003), *citing* Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J. L. & POL'Y 709, 714 (2001).

[53] Following 1976 amendments to 62 P.S. §1973, the Pennsylvania's Department of Public Welfare was prohibited from using this provision as a basis to seek reimbursement for MA from the adult children of indigent persons. *See* e.g., 62 P.S. §432.6 (1976), which in turn was repealed (without reviving 62 P.S. §1973 for DPW) by later legislation. If DPW takes the position at some future date that Act 43's recodification suddenly restored its discretionary right to sue adult children for reimbursement, a very dramatic change in policy would be the result. This development would also suggest a question about the candor of agency representatives, supporters or drafters of Act 43 in describing it as a "mere" recodification of "existing" law at the eleventh hour that passage was sought on July 7th.

[54] E.g., 42 U.S.C.A. §1396p(b)(1).

[55] *See* 62 Pa.C.S.A. §1412 and 55 PA Code §§258.1 *et seq.*

[56] *Presbyterian Medical Center* v. *Budd*, 832 A.2d 1066 (Pa. Super. 2003).

[57] *Id.* at 1069.

[58] *Id.* at 1073.

[59] *Id.* at 1074. The court did, however, note the possibility of a timely claim having been made before the Orphan's Court for an accounting of the Mother's estate. *Id.*

[60] *Id.* at 1075.

[61] *Id.*

The court noted the similarity between the *Budd* daughter's manipulative behavior and that of the adult child in *Albert Einstein Medical Center* v. *Forman*,[62] who also used a power of attorney to deplete parents' assets while refusing to pay for nursing home expenses, behavior which also triggered the court's reliance on Pennsylvania's filial responsibility law as an avenue for recovery.[63]

The movement of the indigent support provision from the Public Welfare Code to the Domestic Relations Code will undoubtedly increase its visibility and the frequency of its citation as a basis for claims by hospitals, nursing homes and similar creditors against available family members. One problem, however, is that liability under Act 43 is not limited to cases involving evidence of financial abuse or manipulation—what might best be termed the "bad" child cases—and ones that cry out for a sanction. Rather, Act 43 exists as a potential creditor's claim anytime someone believes a particular adult child or other financially solvent, "statutory" family member *should* be the payer for the "indigent" person.

Indeed, a curious dichotomy appears to exist with the juxtaposition of Medicaid and renewed interest in filial responsibility laws. Under current federal law, in determining *eligibility* for Medicaid, states are permitted to count spousal resources but are prohibited from counting other family members' assets or income.[64] This has been interpreted in the past as prohibiting states from denying Medicaid to indigent persons who "could" ask for help from more well-off family members. However, the existing Medicaid law does not appear to prohibit the agency from later using a filial responsibility statute to seek a support order on behalf of the "indigent" person receiving MA nor taking the role as a creditor seeking reimbursement.[65] As Pennsylvania and other states are tightening the budget belt on Medicaid—and also reviving old theories of family responsibility—the law makers do appear to be sending a message about priorities in public policy.

CONCLUSION

The implications of Act 43's revival of Pennsylvania's filial or family responsibility law are just beginning to appear on the horizon, signaling important policy questions about allocation of financial obligations between the public and private sectors. As a professor who teaches courses on Conflict of Laws, I will be looking for what frequently happens when neighboring states take conflicting policy positions on disputes with "cross-border" implications, and I foresee the potential for neighboring states to refuse to enforce Pennsylvania's filial support laws against a targeted family member who resides in their own state.[66]

Further, as someone who used to work in a family court clinical setting that was frequently dominated by financial battles disguised as "child custody" disputes, I worry that we will see unintended consequences of the state's renewed interest in filial responsibility laws. I have observed Pennsylvania's thoughtful Elder Law attorneys for more than ten years, and have seen them deal with families with complicated dynamics and tensions that are greatly helped by careful Medicaid planning. I have also seen families reject Medicaid planning options when they reach well-informed decisions that they *can* handle

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[62] *Albert Einstein Medical Center* v. *Forman*, 243 A.2d 181 (Pa. Super. 1968).

[63] *Presbyterian Medical Center* v. *Budd*, 832 A.2d 1066, 1076-77 (Pa. Super. 2003) (extending the *Forman* case's reliance on Pennsylvania's filial responsibility law to a nursing home's claim for "support" made after the impoverished parent's death).

[64] 42 C.F.R. §435.602(a)(1) (providing that in making Medicaid eligibility decisions, "[e]xcept for a spouse of an individual or a parent for a child who is under 21 or blind or disabled, the agency must not consider income and resources of any relative as available to an individual").

[65] *But see*, George F. Indest, *Legal Aspects of HCFA's Decision to Allow Recovery From Children For Medicaid Benefits Delivered to Their Parents Through State Financial Responsibility Statutes: A Case of Bad Rule Making Through Failure to Comply with the Administrative Procedure Act*, 15 So. U.L.Rev. 225 (1988) (taking the position that a 1983 federal government agency transmittal memo "allowing" states to seek reimbursement for Medicaid expenditures through the use of filial responsibility statutes was not only "bad" rule-making—but also "bad" policy). *See also* text at foonote 53, *supra*, suggesting the potential for hidden policy changes.

[66] *See* e.g., *State Welfare Commissioner* v. *Mintz*, 280 N.Y.S. 2d 1007 (N.Y. App. Div. 1967) (concluding that New York would not permit proceedings against an adult child in New York on behalf of an indigent parent in Connecticut, in light of New York's limitations on filial responsibility laws).

the costs of long-term care without public assistance. I worry not about the families who *do* get highly professional Medicaid planning advice, but about those who don't.

For many years, I have been asking whether attorneys *should* be advocating for enforcement of filial responsibility laws to assist older adults. Many families, of course, willingly assume the moral responsibilities for filial care without any need for prompting by a statute. Some additional adult children may respond to Pennsylvania's renewed interest in filial supports law by accepting the obligation to "care for and maintain" their older adults. They may do so because they are persuaded that the statutory law is right—and enforceable. But, if family members reluctantly undertake a filial care obligation because they fear the uncertainties of a state agency's or court's decisions on what will be the dollar value of their obligation to "financially assist" the indigent individual,[67] I worry that such action is neither the wisest—nor the safest—result for our older adults.

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[67] Pennsylvania's filial responsibility law imposes an alternative responsibility, the obligation to "care for and maintain or financially assist" the indigent family member. 23 Pa.C.S.A. §4603(a)(1).