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State Court and Administrative Medicaid Litigation—A Case Study

By Steven C. Perlis

This case began, like many cases, innocently enough. Between the two of them, Mr. and Mrs. Client had more than the approximate $79,000 "community spouse resource allowance" that Mrs. Client was allowed to keep under Medicaid (in addition to the $2,000 "nonexempt resources" by reason of his being the nursing home spouse). In fact, the two of them had a total of around $105,000, consisting primarily of eight jointly owned CDs of varying amounts and maturity dates, as well as swampland in Mississippi owned solely by Mr. Client. The choice had been made to ask the Department of Public Aid to consider Mr. Client's application for Medicaid eligibility. This was done with the realization that the excess assets would result in an automatic denial, leading to an inevitable hearing in front of a hearing officer of the Department to determine whether to approve the application under the circumstances.

Steven C. Perlis is a certified elder law attorney and the founder of the Family Center for Elder Law in Arlington Heights, Illinois. Perlis is a member of the National Academy of Elder Law Attorneys and a former member of its Board of Directors. He has focused his legal expertise on helping senior citizens and people with disabilities and has authored numerous articles concerning various aspects of elder law.

Initial Denial

In early November 1996, Public Aid issued the expected denial notice. The caseworker gave us the impression that there was nothing left except the issue of whether the excess resources should or should not be transferred to Mrs. Client.

Pending (Not Yet Enacted) Illinois Regulation Regarding Spousal Impoverishment

As time was passing, our office became concerned about a proposed change to the state regulation affecting spousal impoverishment cases.[1] This regulation, which was enacted after all of this was over, would require the community spouse to do a calculation based on the purchase of an actuarially sound single-premium life insurance annuity. As it turned out, this regulation never was a factor in the history or development of this case.

The Medicaid Fair Hearing—April 24, 1997

At the appeal hearing, after some initial confusion about the correct application date and asset amount, our office and the Department were able to agree upon an application date of November 27, 1996, and $89,732.40 as the relevant nonexempt asset amount. I explained our contention that Mrs. Client's income was so far below the maximum income allowance that she needed all of her husband's and her assets combined (and then some) to get her income closer to the community spouse income allowance. The Department offered nothing to

refute this and the hearing then concluded. The Hearing Officer gave every impression that he had all of the information he needed to render his decision.

Administrative Reorganization of Appeals and Medical Determinations

At the same time, we became aware of a proposed reorganization within the Public Aid Department. As of July 1, 1997, the Illinois Department of Public Aid (IDPA) and Illinois Department of Human Services (IDHS) were to separate from each other. Medical eligibility determinations and administrative appeals would no longer be handled by the same agency. The General Counsel assured me that this matter would eventually be sorted out, but in the beginning, there might be some delays and confusion in adjusting to this new administrative hierarchy.

The Mandamus Lawsuit—Filed on February 19, 1998, before Judge Jaffe

On February 6, 1998, due to the pressure from the Facility and from the pharmacy, and influenced as well by the uncertainty of waiting, Mrs. Client decided to pursue court action against the State. By then, the facility's bill had increased to around $70,000 and there was a large pharmacy bill as well.

Also, on this date, we prepared the Complaint for Mandamus. We faxed a copy of this Complaint to the General Counsel for the Department. At this point, the General Counsel suggested that the State might oppose us based on a Federal consent decree.[2] He hinted that monthly fines for noncompliance with the timeliness requirements were the sole remedy clients could seek and that any other course of action could result in a dismissal. Ultimately, however, the General Counsel agreed that the State would likely not assert this as a defense in this particular matter.

The complaint was filed on February 19, 1998. Interestingly, on February 22, 1998, our office received a copy of the State's Final Administrative Decision. This decision sent the case back to the local Medicaid agency. This decision was incomprehensible, since by law, only the hearing officer could allow assets in excess of the community spouse resources allowance to be diverted to the community spouse.

Medicaid Administrative Review Case—Filed March 19, 1998, before Judge Durkin

We filed our appeal of the hearing officer's decision in the form of a Complaint for Administrative Review on March 19, 1998. By now, the State's attorneys were speaking optimistically about a quick and favorable settlement.

Events Leading up to the Involuntary Transfer Hearing

On April 23, a notice of involuntary transfer by reason of nonpayment was issued from the nursing home through its attorneys. On April 27, our office formally appealed that notice to the Illinois Department of Public Health.

By the first week of May, the Department of Public Aid had orally agreed to settle the Medicaid administrative review case, effective back to June 1, 1996. Unfortunately, the nursing home and its counsel continued to press ahead with their involuntary transfer action in spite of this development.

Involuntary Transfer Hearing—May 4, 1998

The involuntary discharge hearing occurred at the resident's nursing home. Our office asserted that Federal and State law makes it impermissible for the nursing home to involuntarily transfer a resident while Medicaid eligibility has not yet been finally determined,[3] and that the Federal Medicaid statutory provisions says basically the same thing.

On June 4, our office spoke to Mrs. Client. She informed us that Mr. Client was now admitted to Hospice and the attending nurse had discussed with her the possibility of withdrawing his tracheotomy tube.

On June 19, our office received a copy of the Order of Dismissal and Stipulation in the Medicaid administrative review case, agreeing to payment back to June 1, 1996, and faxed it to the nursing home attorney.

On June 22, our office received a copy of the Hearing Officer's written decision permitting the involuntary transfer of Mr. Client. This decision stated that only Medicaid recipients, and not Medicaid applicants, are legally protected from involuntary transfers. This decision gave Mr. Client ten days to move out. Our office quickly appealed.

Administrative Review Action—Filed June 25, 1998, before Judge Hett

On June 25, 1998, we filed Mr. Client's complaint and scheduled an emergency motion for a restraining order at a hearing on June 29. At this hearing, we argued the emergency motion and the attorney for Public Aid informed the court that an official settlement could be expected within thirty days.

The nursing home attorney appeared and confirmed that the facility was proceeding with its request for involuntary discharge. We argued that the Court should apply the balancing test frequently used in cases where injunctive relief is being sought. We argued that the harm to the resident in allowing an involuntary transfer would be life threatening, permanent, and irreparable. By comparison, the nursing home would suffer relatively little harm in waiting a short time for payment to be made and favorable action had virtually been assured. The Court found our argument persuasive and granted a temporary restraining order in our favor.

On June 30, we prepared a Motion to Clarify Agreed Order and Stipulation of Settlement against Public Aid. The nursing home administrator signed the affidavit supporting this motion. On July 9, we appeared before Judge Durkin for argument. The State tried to contend that it should not be held in contempt since it had essentially complied with the agreed-upon court order of June 15. The court was not persuaded and ruled that Public Aid was to take steps to comply with the court's order by July 17. Mr. Client was ordered to submit any and all group-care credit information to Public Aid by July 24, and Public Aid was to mail payment to the nursing home no later than July 31.

On July 15, the attorney for Public Aid informed us that a prepayment report should be issued for the August fiscal month, but a check could not be issued before July 31. The initial restraining order was later extended until July 29, 1998.

Hearing to Extend Restraining Order—July 29, 1998

On July 29, we appeared seeking another extension on the restraining order. The attorney for Public Aid informed the court that the remaining issue appeared to be the prepayment report. Again, the court allowed an extension, this time until September 5, 1998.

Contempt Action against Medicaid Agency

On July 16, we scheduled a Motion For Rule to Show Cause against Public Aid. On August 3, the hearing on the contempt action against the State was extended to August 27. The attorney for Public Aid provided us with the Prepayment Report. For some unexplained reason, it appeared to omit the period of June 1, 1996 to November 12, 1996.

Final Flurry of Effort to Get Information to Medicaid Agency

On August 27, we spoke to the attorney representing Public Health. When we told her about the payment voucher information our office had just received, she told us that Public Health would cite the nursing home if they continued to pursue involuntary transfer once payment had been made.

Our Unsuccessful Effort to Continue Despite the Resident's Death

Our office spoke to Mrs. Client on August 8, when she informed us that the feeding tube had been removed from Mr. Client on August 4. He died nineteen days later.

On September 3, we presented a Motion for Instructions. We argued that a significant number of individuals were potentially at risk as a result of the recent onslaught of involuntary transfers of residents awaiting word for Medicaid. Thus, the court could invoke the public interest exception to the mootness doctrine and appoint a special administrator to present oral argument and otherwise conclude this matter on its merits. Therefore, the court could make its ruling notwithstanding the recent death of the resident. The court declined to go in that direction, however, and dismissed the action.

Money Damages Lawsuit in Unrelated State Court Case

The Facility pushed ahead on its money damages lawsuit in the Third Municipal District. While this case was still pending, we were able to convince Public Aid to pay the nursing home retroactively to June 1, 1996. It turned out that somebody at the nursing home had erroneously told Public Aid that Medicare (and not Medicaid) covered that time period when, in fact, it did not. Once this had occurred, we were able to tell the court that the nursing home had been, or would be, paid in full. The nursing home's suit was dismissed shortly after that.

Early 1999 Decision in a Different Case Involving the Same Nursing Home

Chicago attorney Janna S. Dutton was able to succeed at the hearing level where we had not been successful less than a year before. She reported that her client applied for Medicaid in October, 1998. The application was denied, not for substantive reasons, but because an uncooperative daughter would

not release financial information she had in her exclusive possession as power of attorney for her mother. The Hearing Officer, the same officer as in our hearing, concluded that as long as the Medicaid application had been filed prior to the discharge notice, and as long as the application, once approved, would cover all arrearages, then the nursing home's action would be dismissed.[4] In fact, this dismissal motion was brought, and the officer ruled in favor of the resident and dismissed the nursing home's action.

Furthermore, the nursing home had committed other technical notice errors under the administrative regulations. These included its failure to give the requisite thirty-day notice before giving the twenty-one-day notice. The nursing home had not discussed its proposed action with any of the family members. The notice from the nursing home was going to discharge the resident to the home of the daughter, although she had never consented to this proposed action.

Conclusion

If it appears to you that this case was enormously expensive to the client and time-consuming to all involved, then you are right. I would like to think that the client's death did not totally nullify all of our effort and expense. The favorable outcome in the recent involuntary discharge case seems to signify a renewed willingness on Public Health's part to throw out a nursing home's attempt to involuntarily discharge a Medicaid-pending resident based on nonpayment of the resident's bill there.

Endnotes

1. ILL. ADMIN. CODE tit. 89, §120.379 (Provision for the Prevention of Spousal Impoverishment, effective June 9, 1997).
2. *Jeffries v. Swank,* 337 F. Supp. 1062 (N.D. Ill. 1971).
3. 210 ILL. COMP. STAT. 45/3-401.1 (2001).
4. *See id.* and 210 ILL. COMP. STAT. 45/3-406 (2001).