



*Written Testimony Submitted to the Judiciary Committee*

*SB 986, AAC the Applicability of Probate Court Orders to State Agencies*

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The Department of Social Services (DSS) opposes this bill because (1) it conflicts with federal and state law; (2) it would result in DSS being bound by probate court orders without having participated in the probate court proceedings; (3) it would place an undue burden on the Superior Courts and the Attorney General's office, who would represent DSS in its appeals, and would place an extraordinary financial burden upon Connecticut taxpayers.

Under federal law, the Medicaid State plan must "provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan." 42 U.S.C. 1396a(a)(5). In Connecticut, DSS has been designated as the single State agency.

As the single State agency, DSS "must not delegate to, other than its own officials, authority to - - (i) Exercise administrative discretion in the administration or supervision of the plan, or (ii) issue policies, rules, and regulations on program matters." 42 C.F.R. 431.10(e)(1). Moreover, "[t]he authority of the agency must not be impaired if any of its rules, regulations, or decisions are subject to review, clearance, or similar action by other offices or agencies of the State," and if other offices perform services for the Medicaid agency, they "must not have the authority to change or disapprove any administrative decision of that agency or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rule, and regulations issued by the Medicaid agency." 42 C.F.R. 431.10(e)(3).

Federal law also provides that the single state agency must treat the inability of an individual to access funds as a result of court order made at individual's request as a transfer. 42 U.S.C. 1396p(c)(1); 42 U.S.C. 1396p(h)(1)(C). The proposed bill appears to violate the federal statutory requirement that the single state agency deny eligibility as a result of action that is attributable to the court by instead requiring the agency to appeal.

Similarly, pursuant to state statute, DSS is specifically designated as the "sole agency to determine eligibility for assistance and services." Conn. Gen. Stat. 17b-261b(a). In

addition, state statute provides that “[a] disposition of property ordered by a court shall be evaluated in accordance with the standards applied to any other such disposition for the purpose of determining eligibility.” Conn. Gen. Stat. 17b-261(a). Finally, state law makes it clear that “the availability of funds in a trust or similar instrument funded in whole or in part by the applicant or the applicant’s spouse shall be determined pursuant to the Omnibus Budget Reconciliation Act of 1993, 42 USC 1396p.” Conn. Gen. Stat. 17b-261(c).

In our experience, advocates for the elderly have attempted to circumvent the Medicaid eligibility requirements by going to probate courts and obtaining decrees such as a trust is not “available” to an applicant, or that “fair consideration” was provided in return for a transfer, or that the applicant retained sufficient funds to meet foreseeable needs, or that a family member lived with and provided services that avoided institutionalization. These are all examples of the types of determinations that DSS is required to make in determining eligibility. Both state and federal law provide that DSS is the sole entity that may make such decisions in accordance with state and federal Medicaid law. The proposed bill, however, appears to conflict with such laws by requiring the Department to recognize and enforce orders made by probate courts.

Second, this proposed bill is problematic because DSS does not have notice of the probate court proceedings that result in court orders and decrees. Individuals often petition the probate court before they have even applied for Medicaid. To require DSS to be bound by an order when it has not had the opportunity to participate in the proceeding is contrary to established case law in the state. Even when DSS receives notice, it is not provided with a copy of the probate application or any supporting documentation that is the subject of the hearing. Often, the person involved may not have applied for assistance and DSS would have no clear reason to participate or would have inadequate information about the individual’s assets, which would undoubtedly be relevant at the hearing. The probate court simply should not be in the business of making Medicaid eligibility decisions that are binding on DSS.

Third, this proposed bill will have a huge impact on DSS and taxpayers if passed. Beneficiaries of multi-million dollar general support trust could run to probate court in anticipation of applying for public assistance, obtain a probate ruling construing the trust or amending the trust to be a supplemental support trust (which we have seen happen) and then apply for assistance. We would be forced to appeal this decision, rather than take our present position of ignoring the order, determining eligibility and requiring the applicant to go through the administrative hearing process. Although the case may ultimately go up on appeal, it would be after a hearing decision that was made in accordance with state and federal Medicaid law, making it more likely that the decision would be correct. The Department is in a better position from an appellate standpoint when we are defending a hearing decision than when we are appeal a probate court order.

In addition, although the Attorney General’s Office sometimes represents DSS at hearings involving probate orders, the cases seldom go beyond the hearing decision. We do not have many hearing decisions that are appealed to the Superior Court. Under this

proposed bill, if DSS had notice of a probate hearing and the outcome of the hearing was binding on it, an Assistant Attorney General would need to attend such hearings on behalf of DSS. In addition, if the probate court were to issue an order that violated Medicaid law, the probate court order would then need to be appealed. The amount of time that an Assistant Attorney General currently spends representing DSS at hearings is substantially less than would be spent attending probate court hearings and appealing probate orders.

The proposed bill would give individuals and their attorneys an incentive to go to probate court even before an application for Medicaid is made. In this case, since DSS would not even be aware of the probate court proceeding, the 45-day appeal period could easily expire before the person even applied for Medicaid, leaving DSS with no option to appeal the probate court decision. DSS, therefore, would be required to expend a huge amount of taxpayer dollars because it would potentially be required to grant Medicaid benefits to people who convinced a probate court to authorize transfers or declare assets as "unavailable" that should have disqualified them from receiving assistance.