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"Granny Goes to Jail" Redux

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By Thomas E. Simmons

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Although never enforced, this statute made it a crime for an attorney to assist their clients with Medicaid planning. We might not have seen the last of it.

The Third Circuit's recent 2-1 decision in *Zahner v. Pennsylvania Department of Human Services* characterized certain annuities as non-countable resources for purposes of Medicaid eligibility.[1] The lower District Court's opinion, however (which I'll refer to by its defendant's name of *Mackereth*) is also noteworthy.[2] In *Mackereth*, the Pennsylvania Medicaid agency asserted that the attorneys representing several plaintiffs had committed a federal crime by assisting their clients with Medicaid planning.

Those Elder Law attorneys who entered practice in the last 15 years or so may not even recall the "Granny Goes to Jail" law that the Medicaid agency in *Mackereth* invoked.[3] The law makes it a federal crime (a misdemeanor or a felony) for an individual, for a fee, to counsel or assist with a disposal of assets which causes an imposition of a period of Medicaid ineligibility. It first went on the books as one of the many provisions of HIPAA. But it has lain dormant since 1997. Until now.[4]

The original statute (that earned the nickname "Granny Goes to Jail"), targeted Elder Law clients themselves by criminalizing transfers which resulted in a period of Medicaid ineligibility; a transfer within the look-back period could result in a period of ineligibility along with a term in prison. It was soon replaced by the statute that is known as "Granny's Attorney Goes to Jail," although it's sometimes referred to by the less descriptive but more legalistic "section 4734." Violators are subject to fines of $25,000 and prison terms of five years (or both).

New York State Bar Suit

No attorney or other Elder Law advisor has ever faced criminal charges or an indictment under the statute. Soon after it went into effect, the New York State Bar sued to enjoin the law.[5] It argued that section 4734 would truncate speech and expression in violation of the First Amendment (and also that it was unconstitutionally vague under the Fifth Amendment). Then U.S. Attorney General Janet Reno concurred. She indicated that the Department of Justice would neither enforce nor defend section 4734 because "the counseling prohibition in that provision is plainly unconstitutional under the First Amendment" while the prohibition on assisting with asset transfers "is not severable from the counseling prohibition."[6] The Congressional Research Service had also written a memorandum which predicted: "To the extent that the provision would prohibit counseling about legal activities, a court would seem likely to declare it unconstitutional."[7] The New York District Court agreed and granted the

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1 –F.3d– (3rd Cir. 2005), 2015 WL 5131367.

2 *Zahner* ex rel. *Zahner v. Mackereth*, 2014 WL 198526 (W.D.Pa. 2014). The opinion was not selected for publication in the Federal Supplement reporter.

3 *Id.* at *5; 42 U.S.C. § 1320a-7b(a)(6)

4 *But see Magee v. United States*, 93 F.Supp.2d 161, 162 (D.R.I. 2000) (dismissing a First Amendment challenge to the criminal statute on standing grounds).

5 New York State Bar Ass'n v. Reno, 999 F.Supp. 710 (N.D.N.Y. 1998).

6 *Mackereth*, at * 6, *quoting* Letters from Janet Reno to House Speaker Newt Gingrich and Senate President Al Gore, Jr., p. 1 (March 11, 1998).

7 *New York State Bar*, 999 F.Supp. at 712-13, quoting CRS memorandum (July 11, 1997).

State Bar's request for a preliminary injunction, enjoining the enforcement of section 4734.

The *Mackereth* Court

In *Mackereth*, the Pennsylvania Medicaid agency — not being bound by the 17-year-old New York court's injunction against the U.S. Attorney General — unearthed section 4734. It did so not to indict the plaintiffs' counsel, but as an affirmative defense, arguing that the annuities in question were void as against the public policy, citing 4734. Although the agency seemed to concede that the counseling prohibitions would unconstitutionally chill attorney-to-client speech, it asserted that the assistance provision, being severable, would not. The assistance provision targets acts, not communications. Specifically, it targets the act of assisting with a transfer of assets that results in a Medicaid transfer penalty.

The *Mackereth* court rejected these arguments. "[I]t would not be feasible to assist a person in transferring assets without the First Amendment right to free speech coming into play in the explanation of the transfer — the so-called counseling," the court concluded. "We too cannot envision one without the other."[8]

Yet note the rather slender reed on which the *Mackereth* court's determination of the unconstitutionality of the Granny's Attorney Goes to Jail law rests: severability. The court could not envision assisting a client with an asset transfer without counseling them about its effect, and so it concluded that the unconstitutional criminalization of counseling a client was inseverable from the act of assisting a client.

Perhaps. But I can envision a client who requests that an attorney prepare a quitclaim deed for several acres of farm land to the client's son. The attorney discusses the finality of a gift and its capital gains and gift tax consequences but omits a discussion of Medicaid issues, despite being well-versed with Medicaid eligibility rules (and thus acting, as section 4734 requires, "knowingly"). If the client applies for Medicaid assistance within five years of the gift, the transfer may, and probably will, result in a period of ineligibility. Does not this present an instance where we can envision one (assisting with the transfer) without the other (counseling about Medicaid rules)?

If state officials can envision this too, it may be that we have not seen the last of the Granny's Attorney Goes to Jail law. ■

8 *Mackereth*, at *6.

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previous amendments. It did so by adding a "medically needy" provision, "no ceiling on federal matching funds and creating a federal matching formula that favored poor states," according to Watson.

Few states took up the Kerr-Mills program, but those that did saw a large expansion of their private nursing home industries.

Former Healthcare Financing Administration (now CMS) head Bruce Vladek has put forward several theories for why: 1) for-profit ventures were likely more aggressive in seeking Kerr-Mills reimbursement; 2) nursing homes made it an easy place to discharge patients from hospitals with patients then charged to the Kerr-Mills program; and 3) the "medically needy" spend-down provisions greatly widened the pool of people who could qualify.

By 1965, private nursing homes had replaced the almshouse of yore and depended on government to cover 60 percent of their patients.

These institutions, while not as bad as those described by Nellie Bly 80 years prior, were still considered "substandard, had poorly trained or untrained staff, and provided few services," according to Watson.

The Advent of Medicaid and Medicare

In 1965, President Johnson brought, for the first time, universal health insurance for seniors through Medicare and a means-tested system Medicaid, which included long-term services and supports, to provide health care to the poor.

The Medicaid statute required that states receiving federal Medicaid funds must provide "nursing facility services" that "can only be provided in a nursing facility on an inpatient basis." This has largely ingrained the institutional bias of our system to date.

With these new programs, the nursing home industry exploded in growth. By 1967, payments to the nursing home industry doubled sixfold from $449 million to $3.5 billion. Thereby securing this nation's institutional bias for another half century to the present. ■