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HIA
Health Insurance Associate

October 30, 2002

Rep. Matthew E. Baker
74 Main Street
Wellsboro, PA 16901

Dear Matt:

As per our meeting at your offices in Wellsboro on Friday, October 25th, enclosed are some materials regarding the long-term care subject.

We agree with you that we will soon have a long-term care funding crisis in both state and federal government. It will only get worse as folks live longer and utilize more medical resources. The only way I see to solve some of the strain being put on the Federal and State Medicaid program is to tighten up the rules of eligibility and eliminate the current legal loopholes. Also to encourage purchase of long-term care insurance. If this does not happen, there is no way the current system can continue.

Enclosed are two sets of ads. One set are ads for the purchase of long-term care coverages. The ads by three law firms, tout legal planning to avoid paying for long-term care by the individual. Well, if the individual is not going to pay, and does not buy long-term care insurance, then federal and state tax dollars are the ONLY other resource. The ads by the law firms basically discourage buying any insurance. As long this situation is allowed to continue, folks will not spend money on long-term care insurance.

We urge you to take the necessary legislative steps to end these loopholes and legal dodges. If we do not all pull on the wagon, it will not go anywhere. I will look forward to your thoughts on this subject, both now and in the future. When you schedule eases somewhat, let's schedule a meeting at our offices for further discussions. Would you be interested in speaking to our local chapter of NAIFA on this subject? We meet the third Thursday of each month at different locations, including Wellsboro.

Sincerely yours,

James E. Collins, CSA, HIA, MHP, LUTCF

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FAX: (717) 787-7439

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FAX: (215) 560-2627

3263 NORTH FRONT STREET
PHILADELPHIA, PA 19140
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FAX: (215) 560-3260

REPLY TO: Harrisburg

Original: 2299

Senate of Pennsylvania

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PENNSYLVANIA PUBLIC TELEVISION
NETWORK COMMISSION

November 26, 2002

Mr. John R. McGinley, Jr.
Chairman
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

Dear Chairman McGinley:

This letter is in response to proposed regulations published in the Pennsylvania Bulletin on October 5, 2002 that amends Title 55. Department of Public Welfare, §178.124. Resource Eligibility Requirements for an Institutionalized Spouse with a Community Spouse.

This change would be devastating to nearly every low-income spouse who has a spouse in a nursing home. Currently, persons with low income are permitted to maintain additional assets to meet their minimum needs such as food, utilities or rent. This "resource first" rule allows persons with low incomes, known as the community spouse, who have a spouse in a nursing home to avoid total impoverishment by maintaining the minimum funds to meet their basic needs. This protects mostly community spouses who have minimum income normally between $300-$600 per month. The proposed "income first" rule requires that the additional income needed by the community spouse be provided by allocating some or all of the institutionalized spouse's income to the community spouse.

I wrote a letter to the Governor back in June when this change was proposed in the budget. Attached is a copy of Secretary Houstoun's response to that letter. Although the example used in her letter appears accurate, it is important to point out that the reason behind the current "resources first" rule to protect additional assets for a spouse is because the community spouse often becomes impoverished once the spouse in the nursing home passes away. The proposed rule change would mean that the community spouse who relies upon the institutionalized spouse's income to meet their minimum monthly needs will lose that income when the institutionalized spouse passes, placing the community spouse in dire financial circumstances. Generally, the persons who benefit from this rule are women who did not work

outside their homes and generally are in their 70s and 80s. They have little or no social security, no pension, and often will not receive a spousal portion of their husband's pension upon their husband's death.

It is irresponsible to try to save the state money by further penalizing older Pennsylvanians who are already living with the heartbreak and pain of having to move a spouse into a nursing home. I am hopeful that these regulations will be revised once the Commission realizes the serious impact of this change on the senior citizens of this Commonwealth.

Sincerely,

Christine M. Tartaglione

Christine M. Tartaglione
State Senator

CMT/ps
cc: Secretary Feather O. Houstoun
Senator Vincent Hughes

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
P.O. BOX 2675
HARRISBURG, PENNSYLVANIA 17105-2675

Feather O. Houstoun
Secretary

Telephone 717-787-2600/3600
FAX 717-772-2062

OCT - 4 2002

The Honorable Christine M. Tartaglione
Senate of Pennsylvania
Harrisburg, Pennsylvania 17120

Dear Senator Tartaglione:

Earlier this year, you wrote to Governor Mark S. Schweiker expressing concern over the Department of Public Welfare's (DPW's) proposal to change the rules for protecting income for a community spouse when the other spouse enters a nursing facility. Since the passage of the General Appropriations Act for FY 2002-03, we have considered the issue further and have determined, for the reasons explained below, to propose new regulations that would govern how DPW considers income and resources in this situation. The proposed regulations will be published in the Pennsylvania Bulletin on October 5, 2002.

Section 1924 of the Social Security Act, 42 U.S.C. § 1396r-5, enacted as part of the Medicare Catastrophic Coverage Act (MCCA), provides for the protection of income and resources when one spouse is in a nursing facility and the other spouse remains in the community. Included in this statutory scheme are provisions to protect the community spouse's one-half share of the couple's combined resources, subject to a minimum and a maximum established by the Federal statute. Federal law also includes provisions to protect the community spouse's income level. The law sets a minimum income standard for the community spouse at 150 percent of the Federal poverty income level for two people. This standard is referred to in Federal law as the "minimum monthly maintenance needs allowance." The community spouse can have additional income to meet shelter expenses (rent or mortgage, utilities, etc.) if the expenses exceed $448 per month. The maximum community spouse maintenance needs allowance is $2,232.

DPW's proposal would continue to protect the community spouse's income level but would change how the community spouse will receive additional monthly income if the income received in his/her name alone is below his/her maintenance needs allowance. The methodology DPW proposes to adopt is often referred to as the "Income First Rule." If the community spouse's income is below his/her maintenance needs allowance, this method requires the spouse in the nursing facility to transfer some of his/her monthly income to the spouse at home to bring his/her income up to his/her protected income level, before additional resources can be used to generate additional income for the community spouse.

Under DPW's proposed approach, couples with available resources would be expected to use a portion of their resources to pay an increased but still fair share of the spouse's cost of nursing home care. We do not propose that couples divest themselves of all of their resources. Similarly, we do not propose a reduction in the level of income protected for a community spouse.

An example serves to illustrate the difference between the current rule and the proposed Income First Rule. Assume a couple has $100,000 in countable resources (excluding the home). One-half of that total, or $50,000, is considered available to each spouse. Assume the community spouse's maintenance needs allowance is $1,500 per month and he/she has only $1,108 per month income in his/her name. He/she is entitled to an additional $392 per month income. Under current rules, the couple can use the resources of the institutionalized spouse to purchase an annuity that will provide the additional income of $392 to the community spouse for the rest of his/her life. If the community spouse is 72 years of age, the estimated cost of such an annuity is $47,600. Under the current rule, the institutionalized spouse's resources are used to purchase an annuity for the community spouse instead of being used to pay for the institutionalized spouse's care. In this example, the institutionalized spouse, with only $2,400 in resources after the purchase of the annuity, is immediately eligible for Medicaid. Under the Income First Rule, the institutionalized spouse provides the community spouse with $392 per month from his/her income. The $47,600 that would have been used to purchase an annuity under the current rule is available under the Income First Rule to pay for nursing care.

At a time when health care costs continue to rise with no concomitant increase in state revenues, difficult decisions must be made to contain costs and assure that funds are available to continue coverage of essential health care services to Medicaid recipients. Our approach in administering and funding the Medicaid Program's expansive service coverage has been to protect benefits for those in greatest financial need while looking at those areas of the Medicaid program where individuals have the capacity to utilize existing income or resources to pay for part of their care before qualifying for Medicaid. Understandably, proposals to adopt policies such as the Income First Rule evoke concern; however, given the current (and projected) fiscal realities confronting the Commonwealth, we cannot fail to consider policy changes essential to preserving the economic viability of the Medicaid Program.

The public will have a 30-day comment period to submit responses to our proposed regulations before they are published as final rulemaking. DPW will review all comments received, and we will continue to search for solutions that are both reasonable and equitable to help us in our effort to provide health care coverage to Pennsylvania's most vulnerable citizens.

OCT - 4 2002

Thank you for your continued interest and concern. If you have questions concerning the proposed regulations, please do not hesitate to contact me.

Sincerely,

Feather O. Houstoun

Feather O. Houstoun

GEORGE KENNEY, MEMBER

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11749-C BUSTLETON AVENUE
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RESIDENCE:
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PHILADELPHIA, PENNSYLVANIA 19116

House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

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HEALTH & HUMAN SERVICES, CHAIRMAN

CONSUMER AFFAIRS
URBAN AFFAIRS
MAJORITY POLICY
COMMITTEE ON COMMITTEES

BEN FRANKLIN/IRC PARTNERSHIP,
MEMBER

Original: 2299
Individual copy to each Commissioner

October 10, 2002

Robert Nyce, Executive Director
Independent Regulatory Review Commission
333 Market Street
14th Floor, Harristown 2
Harrisburg, PA 17101

Dear Mr. Nyce,

The following comments are submitted on behalf of the House Health and Human Services Committee in opposition to the Department of Public Welfare's proposed regulation 14-478, relating to Medical Assistance eligibility for long-term care services.

One component of this proposed regulation seeks to change the formula for determining the spousal share and eligibility for Medical Assistance when an individual enters a nursing home and has a spouse remaining in the community by changing Pennsylvania from a "resource first" state to an "income first" state.

The House Health and Human Services Committee has taken the extraordinary measure of convening a full committee meeting on this proposed regulation. The committee vehemently expressed its opposition to this proposed regulation by voting for its disapproval. It is the consensus of the committee that the "income first" change will be detrimental to senior citizens, many of whom are living on a limited income. There is no doubt that, dependent on the limited resources and earnings available to them, impoverishment for the community spouse would be inevitable. The resulting effect is that rather than being a Medical Assistance cost containment measure, this regulation will force more seniors into poverty, resulting in their reliance on public assistance for survival.

The committee feels that a decision should not have to be made to determine if impoverishment of the state's senior citizens or savings to the state's Medical Assistance program, which has a

growing appetite for state dollars, is more important; therefore, we cannot, in good conscience, support this regulation.

Thank you for the consideration of the committee's comments.

Sincerely,

Representative George Kenney
Majority Chairman

Representative Frank Oliver
Minority Chairman

cc: Health and Human Services Committee Members
John R. McGinley, Chairman IRRC
Alvin Bush, Vice Chairman IRRC
Arthur Coccodrilli, Commissioner IRRC
Robert Harbison, Commissioner IRRC
John Mizner, Commissioner IRRC

14-478 #1

MAIN STREET OFFICE
16 West Main Street
Bloomsburg, PA 17815-1703
570.389.0663 telephone
570.389.8027 facsimile

P. Jeffrey Hill
Susan M. Hill
Wm. Kim Hill

HARDING & HILL LLP
ATTORNEYS AT LAW

THIRD STREET OFFICE
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Bloomsburg, PA 17815-1707
570.784.6770 telephone
570.784.6075 facsimile

Elwood R. Harding, Jr.

ORIGINAL: 2299

October 8, 2002

Edward J. Zogby, Director
Department of Public Welfare
Bureau of Policy, Room 431
Health and Welfare Building
Harrisburg, PA 17120

RE: Medicaid Issues
Our File No. 3523(00)

Dear Mr. Zogby:

Please consider these comments in connection with the regulations recently published in the Pennsylvania Bulletin that would have the effect of eliminating the protections to the community spouse afforded under the "Hurly" case and transform Pennsylvania into an "income first" state for purposes of calculating the share of assets to which a community spouse will receive. These regulations are unduly harsh and potentially financially punitive to the community spouse.

As an attorney whose practice entails assisting the elderly, I have seen situations arise where an "income first" approach would have resulted in significant financial hardship to the community spouse. Where the community spouse has a limited income, the "income first" approach requires that income from the institutionalized spouse be made available to the community spouse to raise the community spouse's level of income to the minimum monthly maintenance allowance. However, should the institutionalized spouse die, frequently the income that was previously available to the community spouse dies with the institutionalized spouse. The community spouse then simply lacks income to meet basic needs.

However, the ability of the community spouse to protect additional assets under the Hurly option enables the community spouse so that sufficient income will be available to meet that spouse's needs even after the death of the institutionalized spouse. I cannot overemphasize the importance of this to an elderly person who, under the "income first" approach, experiences the devastation of losing a lifelong companion while having their ability to live independently taken from them. We ought not to subject our parents and grandparents to this type of stress.

RE: Medicaid Issues
Our File No. 3523(00)

I urge you in the strongest terms to reconsider these regulations and adopt the fairer and more compassionate approach that the option provided through the protections of Hurly permit. Pennsylvania can and must do better by its senior citizens than subject them to the potential hardships raised by application of the "income first" approach.

Thank you for your consideration of these comments.

Sincerely,

Elwood R. Harding, Jr.

ERH:jlg
cc: The Honorable Harold F. Mowery, Jr.
The Honorable Vincent Hughes
The Honorable George Kenney, Jr.
The Honorable Frank Oliver
Independent Regulatory Review Commission
David Sumner, Director of Policy
Suzanne Itzko, Rendell for Governor

Original: 2299

155 Lake Cliff Drive
Erie, Pennsylvania 16511

#14-478-52

November 23, 2002

Department of Public Welfare
Attention: Ed Zogby
Office of Income Maintenance
Bureau of Policy, Room 431
Health & Welfare Building
Harrisburg, PA 17120

Re: Proposed Rulemaking changes to Medical Assistance regulations

Dear Mr. Zogby:

I am writing in regards to the proposed Rulemaking changes by your office to Pennsylvania's Medical Assistance eligibility requirements as published in the Pennsylvania Bulletin on October 4, 2002. I oppose the change from the current resource first approach to an income first approach because it will impoverish my wife or myself if either of us should have to go into a nursing home.

We can't afford nursing home insurance and will have to depend on Medicade but this rule change is wrong. Especially since most of the savings from it will be retained by the federal government. What is the point of forcing people into poverty.

If this change goes through while the Republican party holds the governors office it will do irreparable harm to the party in future elections for years to come. I speak as a Republican Party Committeeman for Lawrence Park District 1 which has a high percentage of elderly people in it.

Sincerely yours

Irvin L. Coleman, Jr.

cc: The Honorable Harold F. Mowery, Jr.
Senate Committee on Public Health& Welfare
Pennsylvania Senate
Senate Box 203031
Harrisburg, PA 17120

Original: 2299

14-478-47

DISABILITIES LAW PROJECT

Philadelphia

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Office of Income Maintenance
Bureau of Policy

NOV 0 7 2002

REFER TO: Karole Aldridge
Willie
OLC
Hoover
File

November 4, 2002

By Facsimile Transmission and First Class Mail

Edward J. Zogby, Director
Bureau of Policy
Department of Public Welfare
Health and Welfare Building, Room 431
Harrisburg, PA 17120

Re: Proposed Regulations to Eliminate the Home Maintenance Deduction

Dear Mr. Zogby:

The Disabilities Law Project writes to urge the Department of Public Welfare to withdraw its proposed amendments to regulations which will eliminate the Home Maintenance Deduction for persons who are experiencing a limited stay in a nursing home or rehabilitation facility. The Disabilities Law Project ("DLP") is a not-for-profit law firm that provides free legal assistance to persons with disabilities throughout the Commonwealth and is the legal back-up center to Pennsylvania Protection and Advocacy. DLP advocates to remedy discrimination encountered by citizens of the Commonwealth who have disabilities and to assure that they are able to participate to the fullest extent in society alongside non-disabled persons. DLP works through litigation and policy initiatives to ensure that persons with disabilities are able to live lives fully integrated in the community, and not subject to segregation in institutions such as nursing homes.

DPW's proposal to eliminate the Home Maintenance Deduction is not just likely to result in long term, costly institutionalizations for persons who could return home after a brief period of rehabilitation services, but is actually *designed* to do so. Currently, DPW allows a person whose treating physician has certified that they are likely to return home in six months or less after being admitted to a rehabilitation or nursing facility, to set aside an extremely modest amount of income toward making sure they have a home

to return to when their need for nursing home or rehabilitation services has ended. Without the ability to spend this money to pay rent, mortgages, upkeep or taxes, most persons temporarily in need of nursing home care or other short term rehabilitation services will without doubt lose the homes to which they could return.

At a time when they were sick, ill or injured enough to need skilled nursing or other rehabilitative care, DPW would have them negotiating with their bank or landlord[1] to accept six months' of non-payment of the mortgage or rent, or instead to pack up and move out of their household. It is likely that not only would their homes be lost, but many of their possessions as well.

Once the initial need for nursing home care or rehabilitation had passed, it is ridiculous to assume that these persons could locate housing to which they could move. There is a crisis in affordable and in accessible housing in our nation and in our Commonwealth, and for persons who need both accessible ***and*** affordable housing, the search is often fruitless. DPW would ask people just recovering from the need for skilled nursing services to engage in a house-hunting experience that anyone would find daunting. And to do so on the very limited income which made them eligible for Medical Assistance in the first place.

The likely result of this proposal is that once people lose their homes, they will be unable to find new ones and will end up staying permanently in nursing facilities at DPW's expense. Instead of allowing them to spend a very modest amount, currently $572.40 per month, for up to six months to assure there will be a home to return to when they are ready, they will likely stay in nursing facilities permanently and at substantial expense to DPW.

DPW's plan to eliminate this program raises substantial Americans with Disabilities Act issues. DPW is required by federal law and directives by the federal Department of Health and Human Services to operate its Medical Assistance program in a manner which assures that people will receive services in the most integrated setting. Instead of encouraging people's return to their homes where they can be served more economically in an integrated setting, DPW's proposal will force people to remain in segregated institutional settings, and to do so at greater cost to the Commonwealth.

---

[1] DPW's Regulatory Analysis form and explanation in the Pennsylvania Bulletin both completely fail to take account of the burden on banks and landlords; of the costs of local government entities who attempt to provide low cost public housing; nor indeed of the cost to itself in its CSPPPD program, whose entire goal is to get people OUT of nursing homes and back into the community.

On behalf of Pennsylvanians with disabilities, we urge DPW to withdraw this proposal to eliminate the only means many Pennsylvanians have of assuring a return to their homes and communities following a short need for rehabilitation services.

Sincerely yours,

Lisa M. Day
Attorney at Law

cc: IRRC

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
OFFICE OF GENERAL COUNSEL

DATE: November 6, 2002

SUBJECT: **Public Comments**
Long Term Care Revisions - #14-478

TO: Robert E. Nyce
Executive Director
Independent Regulatory Review Commission

FROM: Ruth O'Brien RO'B/a
Senior Assistant Counsel

Attached are public comments received regarding the proposed Long Term Care Revisions Regulation.

Attachments

cc: Scott Johnson
Niles Schore
Melanie Brown
Sandra Bennett

FACSIMILE TRANSMITTAL 14-478-28

Date 12/31/02

Time

From Vivian Schatz.—

Interfaith Coalition for the General Welfare
c/o Mishkan Shalom. 4101 Freeland Avenue
Philadelphia, PA 19128

To Mr. Edward J. Zogby, Director
Dept. of Public Welfare, Bureau of Policy

Number of pages including this page 1

Message: I urge you not to cut back on Medical Assistance to over 10,000 largely elderly and disabled people in this state. Please withdraw the regulations that would impact the health of the most vulnerable citizens in our state.

Call if there is an error in transmission.

Office of Income Maintenance
Bureau of Policy

OCT 3 1 2002

Karole Aldridge

REFER TO: Willie
OLC
Hoover
File

RECEIVED TIME OCT. 31. 2:01PM PRINT TIME OCT. 31. 2:02PM

JOHN J. McGEE
ATTORNEY AT LAW

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Telephone (570) 342-4944
Telefax (570) 424-8208

November 4, 2002

Original: 2296

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

I am writing to you because the Department of Public Welfare is being less than candid with the Public.

I am writing to you in my capacity as a self-employed elder law attorney who helps individuals obtain Medical Assistance benefits for their spouses who are required to reside in nursing homes. I am also writing to you in my capacity as a resident of Pennsylvania whose taxes pay for the delivery of Medical Assistance. Because of these two roles, I am sensitive to the fact that the Commonwealth of Pennsylvania through the Department of Public Welfare must balance the interests of individuals who seek Medical Assistance and the interests of the taxpaying public. What I have no tolerance for is any bureaucratic agency that proposes regulations based on faulty assumptions <u>even after</u> the inaccuracies of the erroneous assumptions have been pointed out to the agency.

The proposal of the Department of Public Welfare to change its policy from the "resource-first" approach to the "income-first" approach will <u>not</u> save any money for the Department of Public Welfare. In fact, in the long run, it is very likely that it will cost the Department of Public Welfare more funds.

By way of illustration, assume Mr. and Mrs. Smith, each 75 years old, have resources consisting of $60,000 in a jointly owned savings/checking account. Further, assume that Mr. Smith's

JOHN J. McGEE
ATTORNEY AT LAW

income consists of $1000 in Social Security and Mrs. Smith's income consists of $418 in Social Security. If Mr. Smith enters a nursing home and becomes the Institutionalized spouse (IS), Mrs. Smith as the community spouse (CS) is entitled to 2 spousal benefits - a resource allowance (CSRA) and a minimum monthly maintenance needs allowance (MMMNA).

On the day Mr. Smith enters the nursing home, a resource assessment is done. The law provides that one-half of the resources are to be set aside for Mrs. Smith as the CSRA - in this case $30,000 (50% of $60,000). The other $30,000 is considered to be available for Mr. Smith, the institutionalized spouse. Additionally, the law requires that Mrs. Smith is entitled to a MMMNA of $1,493. Since her monthly income consists of $418 from Social Security and $75 of investment earnings (the Department of Public Welfare's formula is 3% annual interest on her $30,000 CSRA), Mrs. Smith is entitled to an additional $1,000 per month. The current Department of Public Welfare policy is to allow Mrs. Smith to take the additional resources from Mr. Smith that are necessary to purchase a commercial annuity sufficient to generate the additional income necessary to meet the MMMNA for the duration of her life. This is the "resource-first" approach. The annuity amount is for calculations only; the purchase of an annuity is not required. Accordingly, Mr. Smith will be immediately eligible for Medical Assistance because his $30,000 will be transferred to Mrs. Smith.

The Department of Public Welfare proposes to require the spouse to take her husband's income, instead of resources, each month to make up the difference ("income-first" approach). The Department of Public Welfare asserts that it will save money by delaying the date when the institutionalized spouse is eligible for Medical Assistance i.e., when his resources are

JOHN J. McCLOSKEY
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below $2,400. The last line of page 3 of the April 10, 2002 minutes of the Long Term Care Subcommittee of the Medical Assistance Advisory Committee states that such action. . . . "will result in a cost savings to the Department by extending the time that an institutionalized spouse remains private pay." The faulty assumption contained within the quoted phrase is the assumption that the mere change to an "income-first" approach will extend the time that an institutionalized spouse remains private pay. The faulty assumption is based on the erroneous representation of the law contained in the third and fourth lines from the bottom in those same minutes. It is stated: "In effect, the resources determined to belong to the institutionalized spouse by the original resource assessment must be used for private pay until the resources are reduced to the MA/LTC eligibility limit." (emphasis added). This statement is not correct. While it is true that the law requires that the resources determined to be available to the institutionalized spouse must be "spent down" to $2,400, the law does not require that these resources be exclusively used for the payment of nursing home care as the sole means of "spending down" those resources. It is federal law and it consistently has been the position of the Department of Public Welfare that the resources of the institutionalized spouse can be used to purchase a commercial annuity to generate income solely for the benefit of the community spouse provided that the purchase is for fair market value, that the annuity is actuarially sound in that the community spouse will receive the amount invested over the period of her life expectancy, and that the income generated when combined with her other income will not exceed the MMMNA of the community spouse. Upon the purchase of the annuity, the institutionalized spouse immediately becomes eligible for Medical Assistance. Mertz v. Houstoun 155 F. Supp. 2d 415 (July 30, 2001) has articulated to the Department of Public Welfare the permissible limits to the Department of Public Welfare's discretion with respect to the purchase of annuities.

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If adopted, the result of the Department of Public Welfare's proposed change from "resource-first" approach to an "income-first" approach will delay the receipt of Medical Assistance benefits only to those spouses who lack the financial sophistication to enable them to purchase a commercial annuity. If that is the intent of the proponents of this change, they are advocating discrimination in a most cruel and sinister way. It is interesting to note that the author of the Section entitled "Proposed Rulemaking" on page 4856 of the Pennsylvania Bulletin published October 5, 2002 states "[that the change to the income-first approach] eliminates the option for a couple to automatically preserve additional resources to purchase an annuity to generate monthly income for the CS." (emphasis added) Is the insertion of the word "automatically" intended to be a clever attempt by DPW to acknowledge that DPW recognizes the legal right of a couple to preserve additional resources by actually purchasing a commercial annuity? If this is so, then DPW is engaging in an arrogant abuse of power by engaging in an institutional form of financial exploitation of the elderly. In essence, DPW is taking the position that:

- DPW will no longer provide the service of informing the CS of the amount of resources to which the CS is entitled by law;
- DPW will force those individuals who have the financial sophistication to enable them to purchase a commercial annuity to do so in order to preserve additional resources; and
- DPW will discriminate against those who lack financial sophistication by failing to advise them that they have a legal right to preserve additional resources by purchasing a commercial annuity.

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Page 8 of DPW's ANALYSIS OF PROGRAM REVISIONS REQUEST states "there will be a significant workload reduction in the County Assistance Office and also the Office of Hearing and Appeals by eliminating the time-consuming methodology, notices and appeal process related to requirements defined in the Hurly Settlement. This streamlining of the eligibility process will result in a reduction of administrative costs." This statement however fails to acknowledge that any projected cost savings will be offset by the administrative costs of examining the various commercial annuity policy contracts that couples will purchase to preserve additional resources. The annuity policy contracts will have to be examined to determine whether the commercial annuity has been purchased for fair market value, is of a nature that is actuarially sound in that the CS will reserve the amount invested over the life expectancy of the CS, and that it contains other contractual provisions that will require compliance with appropriate regulations.

If community spouses are forced to purchase commercial annuities in order to protect the resources of the institutionalized spouse, it is very likely that the Department of Public Welfare will expend more funds on long-term care than it presently does in situations where the community spouse predeceases the institutionalized spouse. For example, if Mrs. Smith is able to retain fully the $60,000 owned by her and her spouse under the "resource-first" approach, she will probably receive advice to exclude her husband as beneficiary of her Will in an effort to bequeath everything to her children. At the death of the community spouse, the Department of Public Welfare insists that the institutionalized spouse elect his statutory share as a surviving spouse to give him $20,000 which renders him ineligible for Medical Assistance. If Mrs. Smith however purchases a commercial annuity with the funds available for the institutionalized spouse and Mr. Smith consents or joins in that purchase, the spousal election does not apply because of a specific provision in the law. Thus, someone who under the

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current "resource-first" approach is not pre-disposed to purchasing a commercial annuity will do so in order to protect the funds and might thereby preclude the Department of Public Welfare from successfully asserting the spousal election.

The proposal of the Department of Public Welfare to change its policy from the "resource-first" approach to the "income-first" approach is accompanied by a callous disregard for the needs of the people for whom it was created to serve. Page 9 of the ANALYSIS OF PROGRAM REVISIONS REQUEST acknowledges that the effect of this proposal is: "The Community Spouse could become impoverished if the Institutionalized Spouse and the Community Spouse have limited income, especially after the Institutionalized Spouse dies." (emphasis added). That statement alone should have been reason enough for the Department of Public Welfare to abandon its proposal. But when coupled with statements on page 8 of the same document that there will be "... a significant workload reduction..." and "... a streamlining of the eligibility process..." one wonders if the mission of serving the public is being replaced by an indifference to the needs of those least able to provide for themselves.

In proposing the change from the "resource-first" approach to the "income-first" approach, the Department of Public Welfare, when viewed in its most favorable light, has formulated a policy as a result of well-intentioned but, nevertheless, misinformed individuals. When viewed most harshly, the Department of Public Welfare has engaged in an arrogant abuse of power by its sponsorship of an institutional form of financial exploitation of the elderly. In either case, the adoption of the "income-first" approach is not in the best interests of the people of the Commonwealth of Pennsylvania.

Accordingly, I am urging you to withdraw the Department of Public Welfare proposal which recommends the change from a "resource-first" approach to an "income-first" approach in

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providing for the minimum monthly maintenance needs allowance of a community spouse.

For your review, I am sending a copy of the correspondence which I sent to Governor Schweiker and DPW Secretary Houstoun on June 10, 2002. To this day, I await a response from both of them to my correspondence of that date.

Sincerely,

John J. McGee

JJM:lag

attachments

per month transfers would not affect eligibility for MA/LTC requested for today. The only transfer that would affect present eligibility is the $5,000 transfer in the current month. Ms. Johnson also said that when a penalty period is imposed, the penalty period only applies to a period of ineligibility for nursing home care and waiver services. The person would remain eligible for other MA services.

The fourth cost containment issue is the "Income First Rule versus Resources First Rule". Under the current "Spousal Impoverishment" regulations, a "Resource Assessment" must be completed on the day that an individual, who has a spouse who remains in the community, is admitted to a nursing home. Their total combined countable resources, regardless of ownership, are considered in determining the amount to be "protected" for the spouse who remains in the community. The "protected" amount is the amount of resources that are set aside for the community spouse and not subject to be committed for the institutionalized spouse's payment towards his cost of care. The "protected" amount for the community spouse is determined as follows: The combined countable resources of both spouses are totaled and divided in half. If the resulting amount is more than the community spouse's maximum allowable protected amount of $89,280, the institutionalized spouse must spend the excess over $89,280 towards his cost of care as a private pay resident until his resources are reduced to the $2,400 MA eligibility limit. If after dividing the combined resources of both spouses in half, the resulting figure would amount to less than the minimum protected amount of $17,856, the entire amount would be considered as protected for the community spouse. For further clarification, Ms. Johnson used the following examples for determining the amount to be protected for the community spouse.
Resources of $200,000- community spouse's protected amount is $89,200.
Resources of $20,000- community spouse's protected amount is $17,856.
Resources of $50,000- community spouse's protected amount is $25,000.

Ms. Johnson also explained the process the Department uses in determining an allowance for the needs of a community spouse. Current regulations allow for a "Minimum Community Spouse Maintenance Allowance" of $1,452.00 and a "Maximum Community Spouse Maintenance Allowance" of $2,232.00 per month. Ms. Johnson explained that a calculation is made based on the incomes of both spouses and the household expenses of the community spouse. If the ensuing calculation results in an amount of less than the "Minimum Community Spouse Maintenance Allowance", an appeal may be filed by the community spouse to secure a larger "protected" share of resources to bring the community spouse's income up to the "Minimum Community Spouse Maintenance Allowance" of $1,452. Appealing the resources assessment is commonly referred to as a "Hurly Amendment appeal." If appealed, and if the subsequent ruling is in favor of the plaintiff, the community spouse would be allowed to keep an additional portion of the combined assets of both spouses, which, if invested in an income-producing annuity, would provide the additional income needed for the community spouse to meet their needs. Under the proposed cost containment regulations, the Department will return to "pre-Hurly" status when determining the amount of protected resources allowed for the community spouse. In effect, the resources determined to belong to the institutionalized spouse by the original resource assessment, must be used for private pay until the resources are reduced to the MA/LTC eligibility limit. By returning to a pre-Hurly status it is expected that it will result in a cost savings to the Department by extending the time that

an institutional spouse remains private pay. The tentative plan calls for proposed rulemaking this summer with final rulemaking and implementation of regulations anticipated for January 2003.

HealthChoices/PANPHA Issues Update - Ms. Alice Penn from the Bureau of Managed Care Operations (BMCO) reported that a question and answer document relating to HealthChoices issues should be ready for distribution at the next LTC Subcommittee meeting. The BMCO solicited input from BLTCP and OIM in its assembling of the document. Ms. Penn requested that any additional questions the members want included on the document should be submitted to her by email at arobinsonp@state.pa.us or by phone at 772-6168 as soon as possible.

Guardianship Fees on Cost Report - Ms. Joyce Haskins (BLTCP) reported that OIM is currently working on a revised policy clarification regarding guardianship fees. The need for the policy clarification was first brought to the attention of the Department when it was discovered that OIM policy was in conflict with federal regulations. OIM policy allowed guardianship fees to be deducted from the MA resident's contribution toward the cost of care. Since federal regulations do not allow the guardianship fee deduction it was necessary to bring OIM policy into compliance. In March 2001, OIM developed a policy clarification that would allow a deduction for guardianship fees if the guardianship were court appointed and the amount would not exceed $100 per month. As a result of the policy clarification, the Subcommittee questioned whether excess guardian fees (over $100) could be entered as a cost on the MA-11 cost report. The BLTCP has conferred with OIM, the Office of Legal Council and the Department of Health and decided that guardianship fees would not be considered as allowable costs on the MA-11 cost report. OIM reviewed a study by the Keystone University Research Corporation conducted on guardianship services. The study provided data on the average charge for guardianship services in Pennsylvania. OIM also surveyed other states to determine their normal charge for guardianship services. As a result of their findings, OIM concluded that a maximum of $100 per month fee for guardianship services would be a fair and reasonable fee to charge MA residents in a nursing facility. Ms. Haskins suggested that if a nursing facility finds itself in a position where it is experiencing difficulties as a result of the cost of excess guardianship fees, it is incumbent upon the nursing facility to confer with the guardian to negotiate a lower fee.

Medicare Health Plans Changes Impact on Nursing Home Industry - Mr. Newett discussed the Medicare Program's new rules concerning enrolling and disenrolling from Medicare health care plans. Current Medicare rules allow for enrolled beneficiaries to switch plans at any time of their choosing. Mr. Newett said that most people entering a nursing facility choose to disenroll from their Medicare health plan and become straight fee-for-service Medicare Part B recipients. Mr. Newett said that problems could arise because Medicare Part B Fee-for-Service plans often do not cover some services necessary in a nursing facility setting. Because of the rule change effective June 2002, Medicare beneficiaries could only enroll, disenroll or change Medicare health plans once a year which would cause problems for institutions and nursing facilities in recovering payments for services rendered.

allowance for the CS. The minimum monthly maintenance needs allowance is an annually updated figure set to a level that is 1/12th of 150% of the official Federal poverty level for a family of two. If the CS's income is less than the minimum monthly maintenance needs allowance, states may adopt a method to permit the amount of the shortfall to be met from the income or resources of the IS in accordance with section 1924(d)(1)(B) and (f)(2)(A)(iii) of the Social Security Act.

The Department's current regulations provide that the income-first method is to be used for providing the CS with additional income to bring her up to the protected level. (See 55 Pa. Code §§ 178.124(b) and 181.452.) This income transfer must occur before additional resources can be protected to provide the CS with income. Current regulations, however, do not conform to current practice which is based on the provisions of a settlement agreement in *Hurly v. Houstoun*, C. A. No. 93-3666 (U. S. Dist. Ct. E. D. Pa.) In *Hurly*, plaintiffs challenged the Department's regulations implementing section 1924(d) of the Social Security Act, contending that the income-first rule did not comply with Federal law. As a result of a settlement reached between plaintiffs and the Department in June 1996, the Department revised its procedures. The Department uses an "annuity rule" which permits the couple to use resources to purchase an annuity that will provide the CS with the additional income that she is permitted. At the time the *Hurly* settlement was reached, there were no Federal regulations to interpret the Federal statute.

On September 7, 2001, the United States Department of Health and Human Services issued a notice of proposed rulemaking allowing states to choose either the income-first or resource-first method to determine how the CS will be provided with additional income. (See 66 FR 4676.) Thereafter, the United States Supreme Court decided that the income-first rule was a reasonable interpretation of section 1924(d) of the Social Security Act. See *Wisconsin Department of Health and Family Services v. Blumer*, 534 U. S. 952 (2002). Based upon these developments, the Department will restore the income-first policy which is set forth in the current regulations including certain technical amendments to improve clarity.

Proposed Rulemaking

This proposed rulemaking eliminates the Commonwealth's Annuity Rule procedure and implements the income-first method when determining how the CS is provided with additional income—the Federal term is the "CS monthly income allowance." Using the income-first rule takes into account the anticipated monthly contribution of income from the IS to the CS to bring the CS's income up to the protected income level. The monthly contribution of income from the IS to the CS is considered before any additional resources can be allocated to the CS for the purpose of generating income. These resources are intended to be used to help pay for the cost of LTC services until the IS is eligible for MA. This method eliminates the option for a couple to automatically preserve additional resources to purchase an annuity to generate monthly income for the CS.

Partial Month of Ineligibility

Background

Section 1917(c) of the Social Security Act (42 U.S.C.A. § 1396p(c)) requires a period of ineligibility for MA coverage of LTC services when the applicant or recipient or his spouse transfers resources for less than fair market value within a specified look-back period. The p
ineligibility is called the penalty period or disqual
period. The length of the penalty period is calcul
dividing the uncompensated value of all transfe
sets by the current average monthly rate for
nursing facility care (NFC) at the time of applic
MA. States have the choice of not imposing a
period for transfers of less than a full month. Pe
nia is using full months and rounding down w
calculation results in a fraction.

Proposed Amendment

This proposal expands the circumstances in w
MA ineligibility period for payment of LTC serv
result from a transfer of an asset that occurs w
market value has not been received. Currently
regulations do not require a penalty period for a
of an asset that is less than the average monthly
private NFC and for a partial penalty period of
1 month when the calculation of the period of in
for payment of LTC services results in a frac
month. A penalty will be imposed under these
amendments for a transfer of asset that is less
average monthly rate and for a partial penalt
This proposal will require that an individual b
sible for paying for LTC services equal to th
amount of the asset that was transferred for
fair market value if a penalty is imposed due to
receive fair market value. Any transfer of asset
less of the amount, will be evaluated to deter
individual will be denied payment of LTC servic

Limit on Unpaid Medical Expenses

Background

An MA recipient who is residing in an LTC
required to contribute to the cost of LTC
monthly income after deductions in accordance
CFR 435.725(c)(4)(ii) and 435.832(c)(4)(ii). Dedu
clude expenses for medical or remedial care
under state law but not covered under the s
plan. These deductions are subject to allowable
state may establish. Current regula
§ 181.452(d)(5)(ii) permit these deductions
the amount of the expense when determining th
of income an MA recipient must contribute to
cost of LTC services. The medical expense is
from the MA recipient's income in the calendar
medical expense is paid by the MA recipient.

Proposed Amendment

This proposal sets a limit of $10,000 for an o
unpaid medical expense that can be used as an
medical expense deduction when calculating
cipient's contribution toward cost of care. Th
limit is a reasonable limit approximately e
months of NFC at the MA rate. The limit is
encourage individuals who are potentially eligi
to apply for MA on a timely basis to prevent
expense debt to a LTC facility at the private r

Elimination of the Home Maintenance Deductio

Background

States have the option of providing a hom
nance allowance deduction when determinin
tion toward cost of NFC in accordance wit
435.725(d) and 435.832(d). This deduction is a
physician has certified that the resident will li
home within 6 months.

DPW must submit a State Plan Amendment to implement this change. This would change the option that Pennsylvania is using under the current federal regulations.

(D). The cost of providing LTC services continues to rise and consume a significant portion of the State budget. This PRR will help defray the increase in LTC costs without impacting the quality of care.

Efficiency/Productivity:

(A). There will be a significant workload reduction in the CAO and also the Office of Hearing and Appeals by eliminating the time-consuming methodology, notices and appeal process related to requirements defined in the Hurly Settlement. This streamlining of the eligibility process will result in a reduction of administrative costs.

(B). The initial implementation of this limitation will require educating of nursing facility providers to prevent rejected of claims submitted to DPW that have included those expenses exceeding the limitation as an allowable medical expense deduction.

(C). The initial conversion should have little impact on the general productivity in the County Assistance Office staff. The change in calculations of the recipient's cost of care could be done as annual Cost of Living Adjustment (COLA) changes are completed and at any client contact which necessitates a change.

(D). Upon approval of the methodology by CMS, CAO staff will require instructions and possible training.

Consideration of Alternatives:

(A). The only other alternative is to continue with existing policy. Continuation of current procedures allow a spouse of a couple to qualify for Medicaid at an earlier date. This earlier authorization increases costs for long-term care.

(B). Other alternatives could include increasing or lowering the dollar amount of what is a permissible outstanding medical expense. Current regulations permit an individual to apply for retroactive Medicaid coverage back three calendar months prior to the month of application of Medicaid. The $10,000 limit seemed reasonable since regulations do permit retroactive Medicaid coverage.

(C). Continuing current procedures will result in escalating Medicaid costs. Applicants/recipients requesting LTC services for short term stays in a nursing facility will increase. Individuals who are temporarily disabled will opt for LTC services instead of home and community based services.

(D). Continuing the current procedure to calculate the penalty period will result in increasing LTC costs. Other alternative methods would likely involve imposing partial months and produce similar results.

Spillover Effects:

(A). -- The IS will qualify for Medicaid later in a LTC facility.
-- The CS could become impoverished if the IS and the CS have limited income, especially after the IS dies.
-- There may be an increase in the number of individuals participating in the Bridge program, and as slots are limited, services may be unavailable to some individuals
— LTC consumer advocates may see this as a detriment to the disabled and elderly and strongly reject this proposal.

(B). As stated earlier, this could result in an increase in uncompensated care for LTC providers. In addition, the Department may need sophisticated tracking and monitoring of claims submitted by providers of LTC to ensure that outstanding medical expenses used as deductions when determining a Medicaid recipient's contribution toward cost of care does not exceed $10,000. Lasty, LTC providers could place a claim on homes owned by Medicaid recipients that currently become part of their estate upon death. This would reduce the funds that are recouped under Medicaid Estate Recovery for reimbursement of services provided under the Medicaid Program.

(C). No legal or advocacy comments have been received at this time. It appears that some advocacy groups will interpret this as a limitation to temporarily disabled individuals who are in need of rehab services in a LTC facility. They may challenge Pennsylvania's choice to eliminate this optional deduction.

(D). LTC consumer advocates and elder law attorneys will oppose this proposal. It should encourage more individuals to plan better to finance their LTC needs and could be an increase in interest and participation in the Waiver programs.

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ATTORNEY AT LAW

June 10, 2002

Edward Newitt, Chair
Long Term Care Delivery System Subcommittee
of the Medical Assistance Advisory Committee
of the Pennsylvania Department of Public
Welfare

Dear Mr. Newitt,

I am writing to you because you may have been misinformed by the Department of Public Welfare.

I am writing to you in my capacity as a self-employed elder law attorney who helps individuals obtain Medical Assistance benefits for their spouses who are required to reside in nursing homes. I am also writing to you in my capacity as a resident of Pennsylvania whose taxes pay for the delivery of Medical Assistance. Because of these two roles, I am sensitive to the fact that the Commonwealth of Pennsylvania through the Department of Public Welfare must balance the interests of individuals who seek Medical Assistance and the interests of the taxpaying public. What I have no tolerance for is any bureaucratic agency that formulates policy based on faulty assumptions, attempts to change policy without seeking the public's input, and advocates its position with a callous disregard for the needs of the people for whom it was created to serve.

1. The proposal of the Department of Public Welfare to change its policy from the "resource-first" approach to the "income-first" approach is based on faulty assumptions. In fact the entire premise of the Department of Public Welfare's cost savings assumption is based on its erroneous representation of the law.

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For example, assume Mr. and Mrs. Smith, each 75 years old, have assets consisting of $60,000 in a jointly owned savings/checking account. Further, assume that Mr. Smith's income consists of $1000 in Social Security and Mrs. Smith's income consists of $377 in Social Security. If Mr. Smith enters a nursing home and becomes the Institutionalized spouse (IS), Mrs. Smith as the community spouse (CS) is entitled to 2 spousal benefits - a resource allowance (CSRA) and a minimum monthly maintenance needs allowance (MMMNA).

On the day Mr. Smith enters the nursing home, a resource assessment is done. The law provides that one-half of the resources are to be set aside for Mrs. Smith as the CSRA - in this case $30,000 (50% of $60,000). The other $30,000 is considered to be available for Mr. Smith, the institutionalized spouse. Additionally, the law requires that Mrs. Smith is entitled to a MMMNA of $1,452. Since her monthly income consists of $377 from Social Security and $75 of investment earnings (the Department of Public Welfare's formula is 3% annual interest on her $30,000 interest), Mrs. Smith is entitled to an additional $1,000 per month. The current Department of Public Welfare policy is to allow Mrs. Smith to take the additional resources from Mr. Smith that are necessary to purchase a commercial annuity sufficient to generate the additional income necessary to meet the MMMNA for the duration of her life. This is the "resource-first" approach. The annuity amount is for calculations only; the purchase of an annuity is not required. Accordingly, Mr. Smith will be immediately eligible for Medical Assistance because his $30,000 will be transferred to Mrs. Smith.

The Department of Public Welfare proposes to require the spouse to take her husband's income, instead of resources, each month to make up the difference ("income-first" approach). The Department of Public Welfare asserts that it will save money by

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delaying the date when the institutionalized spouse is eligible for Medical Assistance i.e., when his resources are below $2,400. The last line of page 3 of the April 10, 2002 minutes of the Long Term Care Subcommittee of the Medical Assistance Advisory Committee states that such action. . . . "will result in a cost savings to the Department by extending the time that an institutionalized spouse remains private pay." The faulty assumption contained within the quoted phrase is the assumption that the mere change to an "income-first" approach will extend the time that an institutionalized spouse remains private pay. The faulty assumption is based on the erroneous representation of the law contained in the third and fourth lines from the bottom in those same minutes. It is stated: "In effect, the resources determined to belong to the institutionalized spouse by the original resource assessment must be used for private pay until the resources are reduced to the MA/LTC eligibility limit." (emphasis added). This statement is not correct. While it is true that the law requires that the resources determined to be available to the institutionalized spouse must be "spent down" to $2,400, the law does not require that these resources be exclusively used for the payment of nursing home care as the sole means of "spending down" those resources. It is federal law and it consistently has been the position of the Department of Public Welfare that the resources of the institutionalized spouse can be used to purchase a commercial annuity to generate income solely for the benefit of the community spouse provided that the purchase is for fair market value, that the annuity is actuarially sound in that the community spouse will receive the amount invested over the period of her life expectancy, and that the income generated when combined with her other income will not exceed the MMMNA of the community spouse. Upon the purchase of the annuity, the institutionalized spouse

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immediately becomes eligible for Medical Assistance. Mertz v. Houstoun 155 F. Supp. 2d 415 (July 30, 2001) has articulated to the Department of Public Welfare the permissible limits to the Department of Public Welfare's discretion with respect to the purchase of annuities.

If adopted, the result of the Department of Public Welfare's proposed change from "resource-first" approach to an "income-first" approach will delay the receipt of Medical Assistance benefits only to those spouses who lack the financial sophistication to enable them to purchase a commercial annuity. If that is the intent of the proponents of this change, they are advocating discrimination in a most cruel and sinister way.

If community spouses are forced to purchase commercial annuities in order to protect the resources of the institutionalized spouse, it is very likely that the Department of Public Welfare will expend more funds on long-term care than it presently does in situations where the community spouse predeceases the institutionalized spouse. For example, if Mrs. Smith is able to retain fully the $60,000 owned by her and her spouse under the "resource-first" approach, she will probably receive advice to exclude her husband as beneficiary of her Will in an effort to bequeath everything to her children. At the death of the community spouse, the Department of Public Welfare insists that the institutionalized spouse elect his ⅓ statutory share as a surviving spouse to give him $20,000 which renders him ineligible for Medical Assistance. If Mrs. Smith however purchases a commercial annuity with the funds available for the institutionalized spouse and Mr. Smith consents or joins in that purchase, the spousal election does not apply because of a specific provision in the law. Thus, someone who under the current "resource-first"

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approach is not pre-disposed to purchasing a commercial annuity will do so in order to protect the funds and might thereby preclude the Department of Public Welfare from successfully asserting the spousal election.

2. The proposal of the Department of Public Welfare to change its policy from the "resource-first" approach to the "income-first" approach is an attempt to change policy without seeking the public's input.

The Department of Public Welfare states that proposed regulations followed by final regulations would be needed to implement this proposal. If the regulations are merely a formalization of the Department of Public Welfare's already adopted policy, there has been no opportunity for input from the public-at-large in the formulation of the policy. The Department of Public Welfare merely disclosing its plans to an advisory committee appointed by governmental representatives is not the same as seeking input from the public-at-large as to the benefits and detriments of proposed changes in policy. If the Department of Public Welfare's position is that the proposing of regulations is the stage of the formulation of the yet-to-be adopted policy at which it seeks input from the public-at-large, then the proposal of the Department of Public Welfare to change its policy from the "resource-first" approach to the "income-first" approach as a cost-savings measure should not find its way into the Governor's proposed budget book until after a policy has been adopted - to do otherwise is to ask the Governor and the legislature to rely upon unreliable numbers.

3. The proposal of the Department of Public Welfare to change its policy from the "resource-first" approach to the "income-first" approach is accompanied by a callous disregard for the needs of the people for whom it was created to serve. Page 9 of the ANALYSIS OF

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ATTORNEY AT LAW

> PROGRAM REVISONS REQUEST acknowledges that the effect of this proposal is: "The Community Spouse could become impoverished if the Institutionalized Spouse and the Community Spouse have limited income, especially after the Institutionalized Spouse dies." (emphasis added). That statement alone should have been reason enough for the Department of Public Welfare to abandon its proposal. But when coupled with statements on page 8 of the same document that there will be ". . . .a significant workload reduction". . . .and ". . . .a streamlining of the eligibility process. . . ." one wonders if the mission of serving the public is being replaced by an indifference to the needs of those least able to provide for themselves.

In proposing the change from the "resource-first" approach to the "income-first" approach, the Department of Public Welfare, when viewed in its most favorable light, has formulated a policy as a result of well-intentioned but, nevertheless, misinformed individuals. When viewed most harshly, the Department of Public Welfare has engaged in an arrogant abuse of power by its sponsorship of an institutional form of financial exploitation of the elderly. In either case, the adoption of the "income-first" approach is not in the best interests of the people of the Commonwealth of Pennsylvania.

Accordingly, I am asking you to

1. Urge Governor Schweiker and Secretary Houstoun to withdraw the Department of Public Welfare proposal which recommends the change from a "resource-first" approach to an "income-first" approach in providing for the minimum monthly maintenance needs allowance of a community spouse; and,

2. Urge Secretary Houstoun to develop procedures that will seek input from the public-at-large when policy planners are first formulating policy so that as many

JOHN J. McGEE
ATTORNEY AT LAW

factors as possible can be taken into account when policies are first being formulated.

Since I have been advised that the June 12, 2002 meeting of the Long Term Care Subcommittee is open to the public, I will attend in an effort to respond to any inquiries that you might have. Prior to the meeting, I would be happy to discuss the contents of this letter by telephone at 570-426-1515.

Sincerely,

John J. McGee

JJM:dmm

cc: Members of the Long Term Care Delivery System Subcommittee of the Medical Assistance Advisory Committee of the Pennsylvania Department of Public Welfare

The Honorable Governor Mark Schweiker

The Honorable Feather O. Houstoun, Secretary of Pennsylvania Department of Public Welfare

attachments (4)

JOHN J. McGEE
ATTORNEY AT LAW

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SCRANTON ELECTRIC BUILDING
507 LINDEN STREET
SCRANTON, PA 18503
Telephone (570) 342-4944
Telefax (570) 424-8268

TELECOMMUNICATIONS MESSAGE

DATE: 11-04-02 TIME: 2:00 PM

ATTENTION: INDEPENDENT REGULATORY REVIEW COMMISSION

COMPANY: COMMONWEALTH OF PENNSYLVANIA

TELECOPY NUMBER: (717) 783-2664

FROM: John J. McGee

NUMBER OF PAGES (including cover sheet): 22

*IF YOU DO NOT RECEIVE ALL OF THESE PAGES, PLEASE CALL JOHN AT (570) 426-1515 AS SOON AS POSSIBLE.

THANK YOU.

****

ORIGINAL: 2299

DISABILITIES LAW PROJECT

Philadelphia

The Philadelphia Building
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Philadelphia, PA 19107-4798
215•238•8070 [Voice]
215•789•2498 [TDD]
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Respond To: Philadelphia

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November 4, 2002

By Facsimile Transmission and First Class Mail

Edward J. Zogby, Director
Bureau of Policy
Department of Public Welfare
Health and Welfare Building, Room 431
Harrisburg, PA 17120

Re: Proposed Regulations to Eliminate the Home Maintenance Deduction

Dear Mr. Zogby:

The Disabilities Law Project writes to urge the Department of Public Welfare to withdraw its proposed amendments to regulations which will eliminate the Home Maintenance Deduction for persons who are experiencing a limited stay in a nursing home or rehabilitation facility. The Disabilities Law Project ("DLP") is a not-for-profit law firm that provides free legal assistance to persons with disabilities throughout the Commonwealth and is the legal back-up center to Pennsylvania Protection and Advocacy. DLP advocates to remedy discrimination encountered by citizens of the Commonwealth who have disabilities and to assure that they are able to participate to the fullest extent in society alongside non-disabled persons. DLP works through litigation and policy initiatives to ensure that persons with disabilities are able to live lives fully integrated in the community, and not subject to segregation in institutions such as nursing homes.

DPW's proposal to eliminate the Home Maintenance Deduction is not just likely to result in long term, costly institutionalizations for persons who could return home after a brief period of rehabilitation services, but is actually *designed* to do so. Currently, DPW allows a person whose treating physician has certified that they are likely to return home in six months or less after being admitted to a rehabilitation or nursing facility, to set aside an extremely modest amount of income toward making sure they have a home

to return to when their need for nursing home or rehabilitation services has ended. Without the ability to spend this money to pay rent, mortgages, upkeep or taxes, most persons temporarily in need of nursing home care or other short term rehabilitation services will without doubt lose the homes to which they could return.

At a time when they were sick, ill or injured enough to need skilled nursing or other rehabilitative care, DPW would have them negotiating with their bank or landlord[1] to accept six months' of non-payment of the mortgage or rent, or instead to pack up and move out of their household. It is likely that not only would their homes be lost, but many of their possessions as well.

Once the initial need for nursing home care or rehabilitation had passed, it is ridiculous to assume that these persons could locate housing to which they could move. There is a crisis in affordable and in accessible housing in our nation and in our Commonwealth, and for persons who need both accessible ***and*** affordable housing, the search is often fruitless. DPW would ask people just recovering from the need for skilled nursing services to engage in a house-hunting experience that anyone would find daunting. And to do so on the very limited income which made them eligible for Medical Assistance in the first place.

The likely result of this proposal is that once people lose their homes, they will be unable to find new ones and will end up staying permanently in nursing facilities at DPW's expense. Instead of allowing them to spend a very modest amount, currently $572.40 per month, for up to six months to assure there will be a home to return to when they are ready, they will likely stay in nursing facilities permanently and at substantial expense to DPW.

DPW's plan to eliminate this program raises substantial Americans with Disabilities Act issues. DPW is required by federal law and directives by the federal Department of Health and Human Services to operate its Medical Assistance program in a manner which assures that people will receive services in the most integrated setting. Instead of encouraging people's return to their homes where they can be served more economically in an integrated setting, DPW's proposal will force people to remain in segregated institutional settings, and to do so at greater cost to the Commonwealth.

---

[1] DPW's Regulatory Analysis form and explanation in the Pennsylvania Bulletin both completely fail to take account of the burden on banks and landlords; of the costs of local government entities who attempt to provide low cost public housing; nor indeed of the cost to itself in its CSPPPD program, whose entire goal is to get people OUT of nursing homes and back into the community.

On behalf of Pennsylvanians with disabilities, we urge DPW to withdraw this proposal to eliminate the only means many Pennsylvanians have of assuring a return to their homes and communities following a short need for rehabilitation services.

Sincerely yours,

Lisa M. Day
Attorney at Law

cc: IRRC

ORIGINAL: 2299

#14-478-51 177009

MATTHEW E. BAKER, MEMBER

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HARISBURG, PA 17120-2020
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FAX: (717) 772-2414

DISTRICT OFFICES:
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WELLSBORO, PA 16901
PHONE: (570) 724-1390
FAX: (570) 724-2168

35 CANTON STREET
TROY, PA 16947
PHONE: (570) 297-3045
FAX: (570) 297-5551

cc: Hicks Knecos

DEPUTY SECRETARY FOR INCOME MAINTENANCE

House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

COMMITTEES
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CHAIRMAN, SUBCOMMITTEE ON HEALTH & HUMAN SERVICES
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TOURISM & RECREATIONAL DEVELOPMENT POLICY
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APPOINTMENTS
INTRAGOVERNMENTAL COUNCIL ON LONG-TERM CARE
PRIMARY HEALTH CARE PRACTITIONERS PROGRAM ADVISORY COUNCIL
APPROPRIATIONS CHAIRMAN ADVISORY COUNCIL

2002 NOV 5 A 9:03

RECEIVED

Hicks(OIM)

November 4, 2002

B/H 410 Please Respond
(to M. Collins and cc: Houstoun
+ cc: Rep. Baker)

Hicks
Eakley
Krone
Dierkers
Cohn

Dec 11-21

The Honorable Feather O. Houstoun
Secretary, Department of Public Welfare
Commonwealth of Pennsylvania
333 Health & Welfare Building
P. O. Box 2675
Harrisburg, PA 17105

Dear Secretary Houstoun:

Under cover of this letter, I am forwarding a copy of correspondence and documentation that I recently received from my constituent, Mr. James Collins. I believe you will find this material self-explanatory.

I would appreciate your review of and response to Mr. Collins' concerns regarding long-term health care funding. Please provide my office with a copy of your reply.

I know that this matter will be carefully and objectively reviewed, and any assistance in addressing this matter will be greatly appreciated.

Sincerely,

Matthew E. Baker

Matthew E. Baker
State Representative
68th Legislative District

MEB:wwr

Enclosures

cc: James E. Collins, CSA, HIA, MHP, LUTCF

Office of Income Maintenance
Bureau of Policy

NOV 0 7 2002

REFER TO: Karole Aldridge
Willie
OLC
Hoover
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FELLOW

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HIA
Health Insurance Associate

October 30, 2002

Rep. Matthew E. Baker
74 Main Street
Wellsboro, PA 16901

Dear Matt:

As per our meeting at your offices in Wellsboro on Friday, October 25th, enclosed are some materials regarding the long-term care subject.

We agree with you that we will soon have a long-term care funding crisis in both state and federal government. It will only get worse as folks live longer and utilize more medical resources. The only way I see to solve some of the strain being put on the Federal and State Medicaid program is to tighten up the rules of eligibility and eliminate the current legal loopholes. Also to encourage purchase of long-term care insurance. If this does not happen, there is no way the current system can continue.

Enclosed are two sets of ads. One set are ads for the purchase of long-term care coverages. The ads by three law firms, tout legal planning to avoid paying for long-term care by the individual. Well, if the individual is not going to pay, and does not buy long-term care insurance, then federal and state tax dollars are the ONLY other resource. The ads by the law firms basically discourage buying any insurance. As long this situation is allowed to continue, folks will not spend money on long-term care insurance.

We urge you to take the necessary legislative steps to end these loopholes and legal dodges. If we do not all pull on the wagon, it will not go anywhere. I will look forward to your thoughts on this subject, both now and in the future. When you schedule eases somewhat, let's schedule a meeting at our offices for further discussions. Would you be interested in speaking to our local chapter of NAIFA on this subject? We meet the third Thursday of each month at different locations, including Wellsboro.

Sincerely yours,

James E. Collins, CSA, HIA, MHP, LUTCF

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*Source: Lewin Group estimates based on the Brookings-ICF Long-Term Care Financing Model, 1992. As cited in, "Long-Term Care: Knowing the Risk, Paying the Price." Health Insurance Association of America, 1997: Pg. 12.
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"The future of long term care"

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PENNSYLVANIA HEALTH CARE ASSOCIATION

November 4, 2002

Office of Income Maintenance
Bureau of Policy

NOV 04 2002

REFER TO: Kayle Aldridge
OLC
Hoover
File

Edward J. Zogby, Director
Department of Public Welfare
Bureau of Policy
Room 431
Health and Welfare Building
Harrisburg, PA 17120

Dear Mr. Zogby:

On behalf of the Pennsylvania Health Care Association, I hereby submit the following comments with regard to Department of Public Welfare Regulation 14-478, Resource Provisions for Categorically NMP-MA and MNO-MA; Income Provisions for Categorically Needy NMP-MA and MNO-MA.

We understand the goal of the Department in reigning in costs of the Medical Assistance Program, and in searching for areas where program changes will produce savings for the Commonwealth. However, we question whether the savings generated by the changes outlined in the proposed regulations are in balance with the potential hardships that certain recipients will endure due to their adoption.

At present, the Medicaid Eligibility process in Pennsylvania is complicated, cumbersome, and difficult for an applicant to encounter. By making several of the changes proposed in this regulation, we are concerned that those complications will only compound, and those in need of crucial services will face greater bureaucratic barriers, and delays in eligibility determinations.

The changes recommended in §181.452 (d)(5) will alter the calculation related to extraordinary medical expenses. As we understand the Department's rationale, this amendment is intended to encourage individuals to file for Medicaid eligibility determination in a more timely manor. We believe that the Departments goal will not be achieved through this methodology and the individual already struggling to pay enormous medical expenses will still be unable to meet those costs. We recommend, instead, that the department consider applying penalties for failure to either apply in a timely manner, or submit required documentation, which is more likely to meet the goal stated by the Department.

The elimination of the home maintenance deduction fails to recognize that nursing facilities are discharging more and more residents to home after a period of rehabilitation. These facilities have a goal of discharging to home as many rehabilitated residents as possible, and the Department should have a similar goal. We believe that this change will disadvantage individuals whose rehabilitative stay requires a longer period of time than what is allowed.

In closing, we question whether a potential savings of $3.171 million is realistic, and whether this savings to the commonwealth is not outweighed by the burdens placed upon the recipients least likely to be able to shoulder the additional financial responsibility. We urge the Department to meet with stakeholders to work together in finding ways to meet budgetary challenges without imposing undue burdens on recipients or providers.

Sincerely

Alan G. Rosenbloom
President and CEO

AGR/tk

Original 2299

PENNSYLVANIA HEALTH LAW PROJECT

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Harrisburg, PA 17101
Telephone: (717) 236-6310
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November 4, 2002

Edward J. Zogby, Director
Bureau of Policy
PA Department of Public Welfare
Room 431
Health and Welfare Building
Harrisburg, PA 17120

Re: Comments of the Consumer Subcommittee of the Medical Assistance Advisory Committee and the Consumer Health Coalition to DPW Proposed Regulations to eliminate the Home Maintenance Deduction

Dear Mr. Zogby:

Please accept the following comments on behalf of the Consumer Subcommittee of the Medical Assistance Advisory Committee and the Consumer Health Coalition, in response to DPW proposed regulations, published October 5, 2002, to eliminate the home maintenance deduction for nursing home residents.

If a person goes into a nursing facility temporarily, Pennsylvania's Medical Assistance program now lets them set aside part of their income to keep up their home. The money (The SSI benefit level, which is $572.40 per month, presently) can be used for rent, mortgage, taxes or other related expenses. This is called the home maintenance deduction. The rest of their income, except for $30 for personal needs, plus certain other regulatory deductions which apply in special cases, goes to the nursing facility.

<u>This regulation is not in the public interest</u>

It is estimated that these proposed amendments will affect 3,794 individuals applying for or receiving LTC under the MA Program. It is only available only where a doctor has certified that the person is expected to return to their residence in 6 months. It is intended to make sure that they have a home to return to. It can mean the difference between a person staying in a nursing facility for six months, and the person having to stay institutionalized for the rest of her life.

It also represents a tremendous detriment to the public health and welfare, as citizens, many of them elderly and all of them with disabilities, must choose between a life of institutionalization and going without care in order to retain their homes.

The regulation conflicts with current DPW and Department of Aging policies favoring de-institutionalization of persons needing the nursing home level of care. It flies in the face of efforts by the intra-governmental long-term care council, to eliminate state policies that promote institutionalization of elderly and disabled citizens of the commonwealth.

This regulation represents a substantial, undisclosed cost to the Commonwealth

The preamble to the proposed regulations offers no justification except cost savings. Ironically, the potential, direct long-term cost to the Commonwealth far exceeds any short-term savings. While the savings in an individual case cannot exceed $3,334.40 (which assumes the person remains in the facility for 6 months, the average cost to the state for nursing home care is $3,870 per month. Thus, if the individual stays in a facility for just one more month (much less a lifetime), all savings obtained through this regulation will be lost.

Original 2299

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November 4, 2002

Edward J. Zogby, Director
Bureau of Policy
PA Department of Public Welfare
Room 431
Health and Welfare Building
Harrisburg, PA 17120

Dear Mr. Zogby:

The Consumer Subcommittee of the Medical Assistance Advisory Committee opposes the Department of Public Welfare's proposed regulations on the elimination of the income-first rule.

We do not believe that the proposed regulations would save the Commonwealth money. Actually, we believe that these proposed regulations would cost the Commonwealth considerable funds that were not considered when the department drafted these regulations. Most importantly, the cost and negative impact to the consumer are so significant that these proposed regulations represent bad policy choices.

The Income First Approach

The proposed regulations would require the Department of Public Welfare to utilize an income-first instead of the resource-first approach that the Department has been using for years. Shifting to an income-first approach when determining Medicaid eligibility is bad policy.

The income-first and resource-first approaches are a product of the Medicare Catastrophic Coverage Act of 1988. These approaches were part of an effort to provide income and resource protections to prevent the community spouse from becoming impoverished when their spouse becomes institutionalized and eligible for Medicaid. The concept is to allow some of the institutionalized spouse's income or resources to be used to supplement the community spouse's income up to a fixed minimum monthly needs allowance amount. The resource-first method allows the community spouse to keep resources above the allowable levels to create an investment that will generate the needed income. The income-first approach transfers income from the institutionalized spouse to the community spouse.

While both methods provide the same outcome of providing the community spouse with needed income while the institutionalized spouse is alive, only the resource-first approach insures that the community spouse will have enough monthly income once the institutionalized spouse dies. Under the department's proposed rule and switch to the income-first approach, when the

institutionalized spouse dies the community spouse will immediately lose needed income and will quickly find herself impoverished. Absent adequate income, a person's health will suffer. Many community spouses will deteriorate and find themselves requiring nursing home care. This care will come at the cost of the state, as these individuals will find themselves eligible for Medicaid.

Not only will this proposed regulation cost the state more Medicaid dollars because impoverished community spouses will be required to be institutionalized at a cost to the state, but the state cost of the institutionalized spouse's care will be increased as the institutionalized spouse's contribution will be diminished by income being diverted to the community spouse. These extra expenditures should be factored in over time.