Original: 2299

STANLEY M. VASILIADIS

TELEPHONE • 610-694-9455
TELEFAX • 610-694-9829

CERTIFIED AS AN ELDER LAW ATTORNEY BY THE NATIONAL ELDER LAW FOUNDATION

ATTORNEY AT LAW

#-14-478-37

Office of Income Maintenance
Bureau of Policy

NOV 06 2002

REFER TO: Karole Aldridge
OLC
Hanes
File

October 31, 2002

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

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

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

The Honorable Dennis M. O'Brien
House Committee on Health and Human Services
Pennsylvania House of Representatives
P.O. Box 202020
Harrisburg, PA 17120

Gentlemen:

This letter contains my comments, suggestions, and objections regarding proposed rulemaking by the Pennsylvania Department of Public Welfare (DPW) published on October 4, 2002, in the *Pennsylvania Bulletin* at 32 Pa. B4854 and 32 Pa. B4860, relating to proposed amendments to 55 Pa. Code Chs. 178 and 181. I am an attorney licensed to practice law in the Commonwealth of Pennsylvania and, furthermore, am certified as an elder law attorney by the National Elder Law Foundation. I limit my practice exclusively to long-term care planning, estate administration, and estate planning. In particular, I devote an extensive part of my practice to protecting Pennsylvania seniors and their families against financially ruinous nursing home costs.

Proposed Change from "Resource-first" to "Income-first" Methodology. Switching to income-first is not in the public interest. The adverse economic impact upon low-income spouses of nursing home residents will far outweigh the modest anticipated savings to DPW. Moreover, because the switch to income-first will have a significant adverse impact on low-income elderly spouses of nursing home residents throughout all of Pennsylvania, the public health, safety, and welfare is endangered. Finally, the substantial adverse economic impact upon low-income community spouses by implementation of the income-first rule makes the change a policy decision of such a substantial nature as to require legislative review.

The fatal flaw of the income-first rule is that it fails to effectively ensure that a community spouse will continue to receive her Minimum Monthly Maintenance Needs Allowance. That's because when an institutionalized spouse dies, the income generated by that individual either ends or is substantially reduced. The community spouse consequently loses the source of her income allowance from the institutionalized spouse. For example, assume a married couple owns a home, car, furnishings, household goods and other tangible personalty of modest value, and savings of close to $200,000. Further assume that husband's monthly income consists of a $1,000 Social Security benefit and his 78-year-old wife's monthly income consists of a $475 Social Security benefit. Under the income-first rule, if husband requires long-term care in a nursing facility, he can qualify for Medical Assistance benefits to pay for his care after the couple's $200,000 are spent down to $91,280. $2,000 represents husband's resource limit. The remaining $89,280 is wife's Community Spouse Resource Allowance. If wife's Minimum Monthly Maintenance Needs Allowance is $1,600 (a typical amount), her monthly income, consisting of her $475 Social Security benefit and $223 deemed return on her $89,280 Community Spouse Resource Allowance, will be $902 below the minimum monthly income to which she is entitled. This income shortage, under income-first, is made up by husband paying over to wife the $902 shortage out of his income. The problem with income-first is that when husband dies, his $902 community spouse monthly income allowance payable to wife terminates. Since wife's Social Security benefit is lower than husband's, wife, as a surviving widow, will trade in her $475 benefit for husband's higher $1,000 benefit. But wife will end up with a monthly income shortage of $377. Under the resource-first methodology, wife's $902 monthly income shortage is made up by allowing her to increase her Community Spouse Resource Allowance by an additional $85,000. She is assured of continuing to receive her minimum monthly income entitlement for as long as she lives rather than have it abruptly terminated upon the death of her husband as would occur under the income-first rule. Meanwhile, under resource-first, husband will pay over all of his $1,000 monthly income toward the cost of his care, rather than only $98 per month.

Partial Month Penalties. The amendments relating to implementation of partial month penalties as set forth in proposed amendments to 55 Pa. Code §§178.104(d), 178.174(d), relating to partial months ineligibility periods lack clarity and contain ambiguities. The regulation fails to articulate the federal requirement, followed by DPW but nowhere contained in any of its regulations, that a period of ineligibility arising out of non-compensated transfers begins to run on the first day of the month in which the transfer was made, provided there are no pre-existing periods of ineligibility. This is a federally mandated requirement set forth at 42 U.S.C. §1396p(c)(D). A subsection (3) should be added to the above amendments to incorporate the federal mandate.

Subsection (2) needs to be expanded upon. It should explicitly state how the fraction is determined and whether the calculation is rounded down to whole days or covers fractional days.

Definitions. The definitions DPW proposes to add to 55 Pa. Code §178.2 are based upon federal statutory definitions located at 42 U.S.C. §1396r-5(d). The federal statute establishes and defines the following terms:

(a) Community Spouse Monthly Income Allowance;

(b) Minimum Monthly Maintenance Needs Allowance;

(c) Cap on Minimum Monthly Maintenance Needs Allowance; and

(d) Excess Shelter Allowance

The definitions proposed by DPW do not correspond to the federal definitions. They are:

(a) Community Spouse Monthly Maintenance Needs Amount;

(b) Excess Shelter Amount;

(c) Maximum Monthly Maintenance Need Allowance;

(d) Minimum Monthly Maintenance Need Allowance;

(e) Monthly Maintenance Need Allowance;

(f) Monthly Shelter Expense; and

(g) Shelter Expense Allowance

It's difficult enough to comprehend the federal Medicaid statute, which the United States Supreme Court has characterized as "an aggravated assault upon the English language", without DPW further confusing matters by introducing similar but different and in some instances, misleading terms. For example, the mandatory federal guidance nowhere provides for a *Maximum* (emphasis added) Monthly Maintenance Need Allowance. Rather, it provides for a cap on the *Minimum* (emphasis added) Monthly Maintenance Needs Allowance, coupled with the opportunity, via administrative hearing or court order, to obtain an increase over the cap. There is no "maximum". Yet, DPW proposes to add the definition "Maximum Monthly Maintenance Need Allowance". Instead, DPW should incorporate the federal definitions of 42 U.S.C. §1396r-5(d) into 55 Pa. Code §178.2 in lieu of those it proposes.

Income-first Amendment Lacks Clarity and Contains Ambiguities. The proposed amendment to 55 Pa. Code §178.124 is extremely confusing. It should be substantially re-written. For example, much of the amendment can be eliminated if §(b)(2) is revised to read as follows: "If a community spouse receives a Community Spouse Monthly Income Allowance from the institutionalized spouse and this, combined with other income of the community spouse, including income generated by the Community Spouse Resource Allowance is insufficient to meet the Minimum Monthly Maintenance Needs Allowance to which the community spouse is entitled, then the Department hearing officer shall increase the Community Spouse Resource Allowance by an amount sufficient to increase the community spouse's income to his or her Minimum Monthly Maintenance Needs Allowance."

DPW fails to indicate how a hearing officer shall determine the amount by which to increase a Community Spouse Resource Allowance in cases where the income of an institutionalized spouse that is paid over as a Community Spouse Monthly Income Allowance is insufficient. For example, is the increase in the Community Spouse Resource Allowance to be calculated on the basis of a presumed rate of return, for example, 3 percent? That is how DPW currently deems income generated by a community spouse from her Community Spouse Resource Allowance. Alternatively, does DPW propose to use an annuity analysis in calculating the increase? Since DPW currently deems to a community spouse a 3 percent rate of return on the Community Spouse Resource Allowance, the same measuring stick should be used to determine how much to increase the allowance in cases where an institutionalized spouse's income is insufficient to make up the shortage.

Effective Date. The Department, in its commentary to the proposed rulemaking, states that it will be effective upon publication in the *Pennsylvania Bulletin* as final-form rulemaking. This raises some unanswered questions. If a Medical Assistance application is filed *before* publication of final-form rulemaking, will the application be reviewed in accordance with the rules in effect on the date the application was filed or does DPW propose to retroactively apply the revised regulations to pending applications? If a Hurley stipulation (wherein DPW and applicant have agreed on a revised Community Spouse Resource Allowance based upon the resource-first methodology) has been submitted to Bureau of Hearings and Appeals for approval before publication of final-form rulemaking, will the stipulation be reviewed in accordance with the rules in effect on the date the stipulation was entered into, or does DPW propose to retroactively apply the amendments in reviewing stipulations?

Thank you for considering the within comments, suggestions, and objections.

Very truly yours,

Stanley M. Vasiliadis

SMV:dss

CARIE

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October 31, 2002

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INDEPENDENT REGULATORY
REVIEW COMMISSION

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

Original: 2299

RE: Resource Provisions for Categorically NMP-MA and MNO-MA; Income Provisions for Categorically Needy NMP-MA and MNO-MA Proposed Regulations

Dear Chairman McGinley:

On behalf of CARIE, the Center for Advocacy for the Rights and Interests of the Elderly, thank you for the opportunity to comment on the proposed regulations for the income-first rule and the elimination of the home maintenance deduction. CARIE opposes these proposed regulations and believes the proposed policies are "penny-wise and pound-foolish." These changes will not save Pennsylvania money but will actually increase costs. The changes are not in the public's best interests. We hope you will consider our concerns and make needed revisions before the final regulations are published and promulgated.

To begin, section 178.124 requires Pennsylvania to utilize an income-first approach when calculating the community spouse's resource allowance. Shifting to an income-first approach when determining Medicaid eligibility is bad policy. The Department of Public Welfare (DPW) will likely not see savings, but rather, could incur additional costs with this policy implementation through increased monthly payments to nursing facilities to compensate for residents' loss of income. We realize that the Supreme Court has ruled that states can choose to use an income-first rule and that many states currently utilize this policy. CARIE suspects that after reviewing facts and figures, the conclusion will be that this policy does not translate into a "cost containment" measure for Pennsylvania.

As you know, the Medicare Catastrophic Coverage Act of 1988 provided income and resource protections to prevent the community spouse from becoming impoverished when applying for Medicaid for an institutionalized spouse. When the community spouse's income level falls below the minimum, the difference can be made up by either the "resource-first" or "income-first" method. 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.

Both methods provide the same outcome of providing the community spouse needed income while the institutionalized spouse is alive. However, with the income-first approach, when the resident dies the community spouse immediately loses needed income and can quickly find themselves impoverished. This policy will particularly have a negative impact upon older women. This means they could lose their housing and not be able to meet their own health care and nutritional needs. If these individuals ultimately need nursing home care, they will likely qualify for Medicaid. When a resident dies, the use of the resource-first approach means that a community spouse will not lose her source of income and can maintain a basic standard of living.

As you examine whether this shift would indeed be a cost containment measure, please consider the following points. The people most affected by this policy are couples with assets of approximately $100,000. Those with more resources will continue to seek estate-planning assistance or would still need to spend down assets, since they cannot preserve excessive assets to generate income above the federal guidelines. Paying privately for nursing home care is costly, so any resources available to the institutionalized spouse in this range would easily be spent in a few months or less. Nursing home providers prefer the income-first policy because it allows them to collect a private pay rate even if it's for a short time. Some may argue that this delay offered by the income-first approach will help decrease DPW's costs. However, once the institutionalized spouse spends down and becomes eligible for MA, the community spouse would be receiving a portion of the institutionalized spouse's income. This will result in DPW paying the nursing home more to make up the difference. These extra expenditures should be factored in over time.

Section 181.452 proposes the elimination of the home maintenance allowance. The elimination of the home maintenance allowance will clearly translate into an increase in expenditures for the Commonwealth. The home maintenance deduction is used by individuals who are admitted to a nursing facility and have been certified by their physician as in need of a short-term nursing home placement. The current regulations allow for a deduction equal to the current SSI level of $574.20 per month from the resident's cost of care and cannot exceed six months. There is no doubt that nursing home residents who rely on Medicaid, and intend to return home, would lose their homes and be forced to stay in the nursing facility at the state's expense. Medicaid recipients are poor. The current $30 per month personal needs allowance provided to nursing home residents on Medicaid is clearly not enough money to maintain a home or an apartment.

Even though DPW has significantly expanded home and community-based Waiver services throughout the Commonwealth, there continues to be a need for short-term nursing home placement. Waiver services can take time to access. Pennsylvania has many barriers in place that delay and prevent consumers from accessing Waiver services. It is highly unlikely that a consumer who is admitted to a hospital and needs rehabilitation services or nursing care for a short duration after the hospital stay will be able to apply, be approved and have Waiver services in place upon discharge. This scenario is even true in the best of circumstances, when helpful family or caregivers are involved as well as a skilled hospital discharge planner who understands the system and application process provides assistance.

If DPW is eventually successful in removing barriers to Waiver services so that consumers can access services in a timely manner, there will still be a need for short-term placement in certain situations. In any case, Waiver does not provide 24-hour round-the-clock care that someone experiencing an acute illness might require. Some older adults lack the support system needed to compliment a care plan upon discharge from a hospital setting. Having the opportunity for rehabilitation or recovery in a nursing facility for six months or less can make the difference needed to allow someone to return home and manage with Waiver services or independently.

We have been told that DPW will not penalize a consumer for using their entire income during the first month of their MA stay in a nursing facility to pay for rent or household expenses such as taxes, mortgage, utilities and insurance. The reality is that one month's income is not enough to cover rent for more than one month and wouldn't meet the household expenses for homeowners for very long. MA recipients by definition have little if any savings to rely upon to meet these expenses.

DPW estimates that approximately 1,500 individuals will be affected annually by the elimination of the home maintenance deduction. Multiplying the current $572.40 per month deduction by six for the maximum allowed time period equals $3,434.40 savings per person or $5,151,600 overall. However, if one calculates the average MA nursing home reimbursement rate using a low average of $130 per day and deducts the individual's contribution to their care, DPW spends approximately $3,035 per month for every MA resident.* Using these very conservative figures demonstrates that if this policy were implemented for 2003, instead of saving the Commonwealth $5,151,600, DPW would be spending approximately $18,210 in 2003 for every resident who did not return home as planned. If only 20% of the 1,500 residents do not return home in six months and stay an additional six months, the state will lose more money than any savings gained by this proposal. Obviously, the more consumers who are prevented from returning home the more it will cost the Commonwealth.

There is also a psychological factor that should be highlighted. If an individual knows that they are losing their home as a result of needing to stay in a nursing home, depression and the lack of motivation to get well often occurs and becomes detrimental obstacles against the person making any improvement. In other cases, the older adult

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For many reasons, this policy is bad for consumers and the Commonwealth. Eliminating the home maintenance allowance is counterproductive to the goal of shifting the delivery of long term care from institutions to the home and community. It shows a callous disregard for older Pennsylvanians who are coping with health problems and struggling to maintain their home. If implemented, it will cause an increase in Medicaid expenditures for continued payment of nursing facility care.

Finally, the *Fiscal Impact, Private Sector*, comment section needs to be revised. Language should be added to indicate that individuals may lose their homes and community spouses of MA recipients may become impoverished upon the death of their institutionalized spouse with the change to an income-first methodology.

Founded in 1977, CARIE is a non-profit organization dedicated to improving the quality of life for frail older adults. CARIE's focus of concern spans the long term care continuum of long-term care needs from those who are homebound to those who are institutionalized. Older adults who experience physical or psychological impairment frequently have difficulty advocating for themselves and are often a silent group. CARIE works to protect their rights and promote awareness of their special needs and concerns.

If you need any further clarification regarding these comments, please do not hesitate to contact me at (215) 545-5728, extension 244 or at menio@carie.org.

Sincerely,

Diane A. Menio
Executive Director

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CARIE

October 31, 2002

Office of Income Maintenance
Bureau of Policy

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REFER TO: Karole Aldridge
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Edward J. Zogby, Director
Bureau of Policy
PA Department of Public Welfare
Room 431
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Sincerely,

Diane A. Menio

Diane A. Menio
Executive Director

14-478-25

Original; 2299

Elder Law Firm of
Marshall & Associates

REPLY TO:
Jersey Shore Office
303 Allegheny Street
Jersey Shore, PA 17740-1405
Telephone (570) 398-7603

Williamsport Office
49 E. Fourth Street, Suite 200
Williamsport, PA 17701-6355
Telephone (570) 321-9008

October 31, 2002

Office of Income Maintenance
Bureau of Policy

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REFER TO: Willie / Karole Aldridge
OLC
Hoover
File

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

Dear Sir:

RE: Comments, Objections and Suggestions in Regard to Proposed Rulemaking (55 PA Code CHS 178 and 181 as Published at 32 Pa.B. 4854.

I am a board certified elder law attorney, and past Chair of the Pennsylvania Bar Association's Elder Law Committee. As an elder law specialist in private practice, I meet each month with many seniors who are struggling with the difficult issues that arise when they or their spouses are confronted with long term illness. This letter is written to express some of my concerns and to make some suggestions regarding the Department of Public Welfare's (the "Department's") proposed revision of the Medical Assistance (MA) eligibility requirements for long term care (LTC) services as published at 32 Pa.B. 4584.

Everyone understands that Pennsylvania is now faced with serious fiscal pressures. These financial constraints arise in part from the weakened economy which both limits revenue growth and expands the number of citizens who lack adequate health care coverage.

In this difficult financial environment, I agree that it is appropriate for the Department to consider ways to contain costs through cutting optional programs and services. The Department is charged with the difficult and complicated task of rationally and fairly expending Pennsylvania's limited Medicaid financial resources in a manner which will best promote the health and welfare of our citizens. It is critical that cuts such as those specified in these proposed regulations, if required, be implemented in a fashion that is well considered, fair, and even handed. It is equally important that the Department's authority to make the changes it proposes be clear and unequivocal.

My primary goal in making these comments is to provide the Department, the IRRC, and the Legislative standing committees with the practical viewpoint of a lawyer who specializes in elder law and who deals, on a daily basis, with the issues addressed in the proposed regulations. While I am admittedly an advocate for the elderly, my comments are intended to improve the regulations, so that each citizen of Pennsylvania will receive fair and equal treatment whether or not they are being represented by an elder law specialist.

My comments, objections, and suggestions to the proposed regulations fall into four general categories:

(1) Lack of Clarity: In many respects, the proposed regulations lack clarity. This is a particular problem because these regulations will need to be interpreted and implemented by county assistance caseworkers across Pennsylvania. Ambiguity will lead to disparate treatment of similarly situated applicants depending upon the county and the caseworker. Thus it is of great significance that the regulations be as unambiguous as possible. Regrettably, some sections of the proposed regulations are so unclear as to almost guarantee wide variations in interpretation by local county assistance offices that will lead to uneven and therefore unfair application of these rules.

(2) Statutory Conflict: In several respects, the proposed regulations seem to conflict with mandatory federal Medicaid statutes and regulations.

(3) Unreasonable intrusiveness and paperwork burdens: The costs, paperwork, and other burdens that will result from the implementation of fractional month transfer penalties will far outweigh any potential cost savings. The paperwork burden will be felt by both the public and private sector. As individuals bounce into and out of temporary Medicaid eligibility due to fractional month penalties on small transfers of assets, the need to file new PA 600s and other eligibility related paperwork will increase dramatically. Better alternatives exist which can save Medicaid dollars for the Department without creating the paperwork nightmare that will result from the regulations as stated in their current form. These less complicated alternatives are lawful, feasible, and more desirable than the Department's proposal.

(4) Costs to be borne by the regulated community. The proposed regulations will place new costs on Pennsylvania individuals and businesses who can least afford them. The regulated community that will bear the costs of these proposed regulations includes low-income community spouses, health care providers, especially nursing homes and local taxing authorities. Because Pennsylvania only provides 46% of Medicaid funding, Pennsylvania will realize only 46 cents of savings for $1.00 of cost borne by the regulated community. The harsh reality is that the costs of these regulatory changes to the regulated community will be more than double the savings realized by the Commonwealth.

(5) Policy: The change to an income-first methodology to limit spousal impoverishment is a policy decision of such import that should be left to the Legislature.

While I disagree with the wisdom of the cuts being proposed by the Department, I recognize the Department is acting responsibly in re-evaluating the rules governing eligibility for long term care services. I hope the Department will review my comments from the perspective of wanting to work together with the regulated community to achieve regulations which will be understandable and unambiguous enough to facilitate fair and even-handed treatment of applicants throughout Pennsylvania and which are in keeping with the intent of Executive Order 1996-1.

In the remainder of this letter I present my specific comments. Please note that the terms Medicaid, Medical Assistance, and MA are sometimes used interchangeably in this letter to refer to the Commonwealth's Medicaid program. In addition, the abbreviation "CS" is sometimes used in this letter to mean "community spouse," the abbreviation "IS" is sometimes used to mean "institutionalized spouse," and the abbreviation "CSRA" is sometimes used to mean "Community Spouse Resource Allowance."

Comments Regarding Proposed Section 178.124 (b) The Change from Resource-First to Income-First

A. Background.

In 1988 Congress passed OBRA 88 (The "Medicare Catastrophic Act") in an attempt to limit the problem of "spousal impoverishment." While much of OBRA 88 was later repealed before its effective date, the spousal impoverishment provisions were retained. (Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.)

Prior to OBRA 88, when one spouse needed nursing home care, Medicaid was available to help pay for the cost of the care if qualification requirements were met. However, in order to qualify for Medicaid, virtually all of the institutionalized spouse's income and assets were required to be spent on the cost of the care. This could have a devastating financial effect on the healthy spouse, especially if most of the income was received by the ill spouse. For example, consider a couple living on the husband's Social Security income of $800 per month and the wife's of $400 per month. They can get by on $1,200 a month income. But, if the husband needed nursing home care, the wife would have to live on only $400 per month. Congress recognized that no one should be forced to live at a poverty level just because their spouse fell prey to the wrong "uncovered" illness. In OBRA 88 Congress addressed the spousal impoverishment problem by mandating that state Medicaid rules must allow the non-institutionalized "community spouse" to retain a minimum income and asset allowance.

Currently, in 2002, these protected allowances are as follows: the community (non-institutionalized) spouse of a Medicaid eligible nursing facility resident is entitled to retain income of at least $1452 per month (the "minimum monthly maintenance needs allowance" or MMMNA). In addition, each state is required to set a minimum resource allowance for the community spouse (currently between $17,856 and $89,280 or one-half the value of the combined available resources of both spouses, whichever is higher, up to a maximum of $89,280, in 2002). Pennsylvania has chosen to set this minimum resource allowance for community spouses at the lowest possible figure - $17,856. In some cases, a greater amount can be protected through a fair hearing, 42 U.S.C § 1396r-5(e)(2), or by court order, 42 U.S.C § 1396r-5(f)(3). This community spouse resource allowance (CSRA) is in addition to $2,400 of resources allowed to the institutionalized spouse.

The question addressed in §178.124 is how the spousal resource allowance is to be calculated for low-income community spouses whose incomes fall below the minimum income allowance.

With the resource-first approach (which is currently used in Pennsylvania), the community spouse is allowed to retain and invest additional resources sufficient to bring her income up to the mandated minimum. Then, upon the death of the institutionalized spouse, the community spouse will be able to rely on those resources to continue to provide her with needed income.

With the income-first approach, potential income transfers from the institutionalized spouse are considered to be part of the community spouse's income for purposes of determining whether a higher CSRA is needed to provide the community spouse with the required income allowance. Indeed, the additional income needed can, in fact, be transferred from the institutionalized spouse to the community spouse to bring her up to the minimum income, provided the institutionalized spouse consents to the transfer. Through a change to the income-first approach, Pennsylvania will require the community spouse to spend down additional resources. Unfortunately, upon the death of the institutionalized spouse, the community spouse will be deprived of any further income transfers from the institutionalized spouse and will have insufficient remaining assets to produce the minimum income allowance. With income-first, after the death of the institutionalized spouse, the community spouse will virtually always have to get by with significantly less income and resources than under resource-first.

In §178.124 the Department proposes to change Pennsylvania from a resource-first methodology of protecting community spouses from impoverishment to an income-first approach.

Both the resource-first rule and the income-first rule apply only where there is a low-income community spouse - whose income is below the mandated minimum allowance. However, the income-first rule helps no community spouse who would not also be helped by the resource-first rule. The sole purpose of the income-first rule is to deny eligibility - thereby requiring the community spouse to spend additional assets on the institutionalized spouse's nursing home care. Although the institutionalized spouse's income will support the community spouse during the institutionalized spouse's lifetime, at his death, the community spouse's income will drop. The result is that the income-first approach may leave the community spouse destitute, but only after the death of the institutionalized spouse. The community spouse will always be better off, over the long run, with the resource-first approach since it will allow her to retain additional assets sufficient to generate the minimum required income, even at the cost of receiving less of the community spouse's income in the short run.

While the Department's proposed switch to this income-first approach may be a dubious policy decision, a United States Supreme Court decision in February of 2002 made it clear that a state could adopt either a resource-first or an income-first methodology. Wisc. Dep't of Health and Family Services v. Blumer, 525 U.S. ____, 122 S.CT. 962; 151 L.Ed.2d 395 (2002). However, as noted below, while Pennsylvania may adopt income-first, the specific methodology which the Department proposes to utilize raises serious legal issues.

B. Issues Raised by Proposed Income-First Regulation (§178.124).

While Pennsylvania is now free to choose to utilize either an income-first or resource-first methodology, the specific income-first regulation proposed by the Department raises a number of significant issues:

1. *The Proposed Regulation Appears to Conflict with Federal Statutory Law*. The specific income-first methodology proposed by the Department, which includes the attributing of the Social Security income of the Institutionalized Spouse to the

Community Spouse, appears to conflict with the anti-alienation provisions of the Social Security Act.

2. *The Proposed Regulation is Unclear in Regard to the Treatment of Spousal Refusal.* In rewriting the regulations regarding spousal impoverishment, the Department needs to clarify its treatment of the refusal of a spouse to make resources available.

3. *The Proposed Regulation Conflicts with Federal Law and Needs Clarification in Regard to the Treatment of Actuarially Sound Immediate Annuities Owned by Community Spouses.* In rewriting the regulations regarding spousal impoverishment, the Department needs to clarify the treatment of the purchase by the spouse of an actuarially sound immediate annuity and bring the regulation into conformity with Federal law.

4. *Other Aspects of the Regulation are in Need of Clarity.* The proposed income-first regulation is unclear and ambiguous to such a degree that implementation will be confusing, unreasonably difficult, and unfair to applicants for benefits.

5. *"Effective Date" Confusion.* The regulation is unclear regarding the persons who will be affected and the rules that will apply on the "effective date" of implementation.

6. *Policy Issues.* Is the proposed regulatory change to income-first a policy decision of such a substantial nature that it should be left to the legislative process?

I will address these issues in turn.

1. *The Methodology Used by the Department in §178.124(b) of the Proposed Regulations Appears to Conflict with Mandatory Federal Anti-Alienation Requirements Regarding Social Security Payments.*

   a. §178.124(b)(2)(viii) defines the institutionalized spouse's income as being the IS's total gross monthly income as described in §181.452(a). §181.452(a) (by incorporation of §181.101) specifically includes "social security benefits including Part B Medicare premiums" in the definition of the IS's total gross monthly income. Thus, under §178.124(b) of the proposed regulations the IS's Social Security income is included in the income which will be allocated to the CS.

   b. §178.124(b)(2)(viii) requires that the income of the institutionalized spouse, including Social Security income, be attributed to the community spouse for the purpose of determining the community spouse's Minimum Monthly Maintenance Needs Allowance (MMMNA).

   c. The Social Security Act at 42 U.S.C. §407 provides:

      "(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any

> bankruptcy of insolvency law."

d. Recently the Federal 2nd Circuit Court of Appeals held that when using an income-first approach, a state (in that case, New York) may not allocate the Social Security income of the IS to the CS without violating the anti-alienation provisions of the Social Security Act. *Robbins v. DeBuono,* 218 F.3d 197 (2nd Cir. 2000). The Court held that attributing (or deeming) the Social Security income of an IS to a CS (as proposed by the Department in §178.124(b)(2)(viii)) effectively alienates that income from the IS in violation of 42 U.S.C. §407.

e. New York state, while in many regards providing substantially more generous protections to community spouses than Pennsylvania,[1] did employ the income-first methodology which the Department proposes; that is, New York did impose an income-first methodology in the determination of the CSRA to determine whether the CS is entitled to retain additional resources. In so doing, New York State attributed the Social Security income of the IS to the CS. In regard to income-first, the New York's regulatory scheme was the same as Pennsylvania will implement with §178.124(b).

f. The 2nd Circuit Court of Appeals in Robbins v. DeBuono held that this attribution of the Social Security income violates 42 U.S.C. §407. Robbins v. DeBuono is thus precisely on point in regard to the Department's proposed §178.124(b)(2)(viii). The Department cannot legally allocate the Social Security income of the IS to the CS, as the Department proposes to do.

g. The question in Robbins was whether the state can deem the IS Social Security income to the CS in calculating the income of the CS for MMMNA and CSRA purposes. This is exactly the question that will arise when the proposed §178.124(b) is implemented. The Court in Robbins found that such deeming of the IS Social Security income to the CS constitutes an assignment of the IS income by "legal process" in violation of 42 U.S.C. §407(a).

> "Because New York's income-first policy, which is implemented both during the fair hearing process and through the express threat of a

[1] Like most states, New York is much more generous to, and protective of, the financial security of a low income community spouse than is Pennsylvania. For example, New York State sets the minimum CSRA at $74,820 while Pennsylvania has chosen to provide the community spouse with only the barest permissible minimum CSRA of $17,856. In addition, New York has regulations that comply with the federal Medicaid provision that the Community Spouse may refuse to use her assets beyond the protected CSRA to pay for the IS care. The spousal refusal option (discussed later in these comments), while clearly mandated under federal Medicaid law, is not addressed in Pennsylvania's regulations. This has the effect of further limiting the CS protections. In addition, Pennsylvania has taken an approach to the purchase of actuarially sound immediate annuities by spouses which is out of compliance with Federal law and has the chilling effect of denying this required protection to the community spouse, unless that community spouse is willing to take the issue to federal court (see discussion hereinafter). The Department should establish rules governing spousal refusal and clarify the rules governing the ownership of actuarially sound immediate annuities as part of this current re-writing of the rules regarding the spousal impoverishment rules.

lawsuit, constitutes an explicit threat to use "legal process" against a community spouse who refuses to expend her husband's Social Security benefits on her own needs, and because threats - implicit or explicit - fall within our definition of "legal process," we hold that the income-first policy as applied to Social Security benefits violates Section 407." Robbins v. DeBuono, 218 F.3d 197, 202

h. The conclusion is that, while Pennsylvania may employ the income-first rule, it may not include the IS Social Security income in the income that is attributed to the CS in determining the CSRA. Pension and other income of the IS may be allocated to the CS, but not Social Security income.

Recommendation: Because of the conflict with the Social Security Act, §178.124 should be revised to provide that the Social Security income of the IS is excluded from the calculation of the IS total gross monthly income for purposes of determining the MMMNA under §178.124(b). The Regulation can continue to provide that pension and other income of the IS will be attributed to the CS in determining the CSRA.

2. *The Proposed Regulation is Unclear in regard to the Treatment of Spousal Refusal.*

a. Proposed §178.124 is a significant change in Pennsylvania's existing rules regarding the protection of community spouses from "spousal impoverishment." In rewriting the regulations regarding spousal impoverishment the Department needs to address the effects of the refusal of a community spouse to make resources available to an institutionalized spouse.

b. Federal law requires that states provide that the resources owned by the community spouse in excess of the CSRA do not make the institutionalized spouse ineligible if the community spouse refuses to make assets above the CSRA available, provided the institutionalized spouse assigns his support rights to the state. This has become to be known as "Spousal Refusal, and is mandated by 42 U.S.C. §1396r-5(c)(3). Pennsylvania's regulations are silent of spousal refusal, even though the provisions of 42 U.S.C. §1396r-5(c)(3) are mandatory and specifically supersede any other provisions of Medicaid law to the contrary.

Recommendation: Since the change to income-first will require community spouses to spend down their limited assets, potentially to as little as $17,856, it is likely that there will be a significant increase in the number of refusals by Community Spouses to make these assets available. As noted in the discussion above, the Department has failed to date to provide rules as to the implementation procedures for these spousal refusal situations, and the proposed regulations conflict with a mandatory federal Medicaid statute by failing to provide for eligibility of the institutionalized spouse when the conditions of 42 U.S.C. §1396r-5(c)(3) are met. For examples of regulations governing spousal refusal Pennsylvania could review and adopt regulations similar to those being used by other states such as New York or Florida.

3. *Conflict with Mandatory Federal Law and Need for Clarity in the Regulations. The Department Should Clarify that Transfer Penalties Under §178.174(d) do not Apply to the Purchase of an Actuarially Sound Immediate Annuity by the Community Spouse.*

a. As noted above, in 1988, Congress passed the "Medicare Catastrophic Act" (OBRA 98) which attempted to limit the problem of "spousal impoverishment." OBRA 88 also established mandatory rules prescribing the penalties that states are required to impose on transfers of assets for less than fair value for purposes of qualifying for Medicaid. Transfers of assets to a spouse or for the benefit of a spouse are specifically exempted from transfer penalties. 42 U.S.C. § 1396p(c)(2)(A).

b. OBRA 88 did not specifically address the treatment of annuities. But it is clear that an immediate annuity[2] can be purchased with payments that are likely to extend beyond the life expectancy of the purchaser/annuitant. The purchase of such an annuity can effectively amount to a transfer of assets to the extent that the annuity payments will likely exceed the life of the purchaser/annuitant/primary beneficiary. If the contingent beneficiary of such an annuity is someone other than the spouse of the purchaser or other exempt transferee, the purchase of such an non-actuarial annuity can amount to a non-exempt transfer of assets which will result in a Medicaid

[2] There are several kinds of immediate annuities. Some may make payments for life, and others for a certain term of years. But all immediate annuities provide for periodic payments that are predetermined and specified when the contract is negotiated. Payments are made at various set intervals at least once each year. Immediate annuities are usually irrevocable contracts. Once the annuity has been purchased, the owner does not have the right to revoke the contract and obtain a refund (except for a "free-look" period of usually the first 30 days after purchase). Types of immediate annuities include the following:

1. Life only immediate annuities. This is an annuity under which the insurer promises to make periodic payments to the beneficiary (typically the annuitant) for the life of the annuitant. This kind of annuity produces the largest periodic payment among annuities that are guaranteed and continue for the life of the annuitant. No provision is made for heirs because the contract terminates on the death of the annuitant, and all remaining principal is retained by the insurance company. Accordingly, a substantial loss is incurred if the annuitant dies early. As a result, this type of annuity is used most often by individuals who require higher, guaranteed payments for the rest of their lives.

2. Life annuities with refund provisions. Providing for heirs becomes possible if the annuity contract is for a period certain (continuing for the greater of the life of the annuitant or a stipulated time period), or if it provides for a refund (guaranteeing total annuity payments at least equal to the premium received by the company). Under the Federal Medicaid guidelines, the purchase of this type of annuity will not create a transfer penalty so long as the period of the guarantee is not longer than the actuarial life expectancy of the annuitant.

3. Period certain annuities. These annuities have no life component. The period of the annuity payments is predetermined and does not depend on the survival of the annuitant. The payment is guaranteed and will be made either to the original beneficiary or, in the event of the original beneficiary's death, to contingent beneficiaries named in the policy. Therefore, the owner is assured of no loss in the value of his estate due solely to an early death. Under the Federal Medicaid guidelines, the purchase of this type of annuity will not create a transfer penalty so long as the period of the guarantee is not longer than the actuarial life expectancy of the annuitant.

eligibility penalty for the purchaser. On the other hand, immediate annuities are a legitimate, secure, and steady source of reliable retirement income of particular value to the elderly, and, if all payments from the annuity are likely to be received by the purchaser during the life expectancy of the purchaser, it is common sense that no transfer of assets has taken place.

c. In 1991 Christine Nye, Director of the Health Care Financing Administration, made the first published federal pronouncement regarding the issue of transfer penalties on the purchase of immediate annuities. Ms. Nye stated, "If the annuity is actuarially equal in value to the transferred resource, the transfer would be one in which fair market value is received and no penalty would be imposed. If not equal, the penalty under Section 1917 for failure to receive fair market value would be applied, that is, to deny payment for institutional services for a prescribed period of time." Letter to Regional Administrator, Region 4, Atlanta, January 24, 1991. The Nye letter continued, "While this is a big policy loophole, we see no way to close it absent legislation." Despite the Nye letter, in Pennsylvania, the Department's policy regarding immediate annuities remained unclear.

d. Congress had the opportunity to close the annuity "loophole" in 1993 (with OBRA 93) when it revisited the issue of transfer penalties. Instead however, Congress, while concentrating its efforts on transfer penalties, in general, and trusts, in particular, delegated the issue of the proper treatment of immediate annuity purchases to the Secretary of Health and Human Services. 42 U.S.C. §1396p(d)(6). The Secretary responded in 1994 with the issuance of Transmittal 64, which specifically authorized the purchase of immediate annuities without transfer penalty if the requirements of the Transmittal are met. 42 U.S.C. § 1396r-5(c)(1)(A) and 42 U.S.C. § 1396r-5(d)(1)(B).

e. Transmittal 64 only deals with the transfer penalty aspect of the annuity. It notes that annuities are usually purchased in order to provide a source of income for retirement but "are occasionally used to shelter assets so that individuals purchasing them can become eligible for Medicaid." The Transmittal then sets up a standard for states to use to distinguish between (1) those "annuities validly purchased as part of a retirement plan," and (2) "those annuities which abusively shelter assets." The purchase of the former carries no transfer penalty; while the latter can be penalized as transfers of assets for less than fair market value, if the transfer is not otherwise exempt. To assign annuities to the two categories the Transmittal notes that "a determination must be made with regard to the ultimate purpose of the annuity."

f. The Transmittal then provides a test for states to apply to determine the ultimate purpose of the annuity. "If the expected return on the annuity is commensurate with a reasonable estimate of the life expectancy of the beneficiary, the annuity can be deemed actuarially sound." The Transmittal then gives states specific directions which states are to follow in making this "actuarial soundness" test: "To make this determination, use the following life expectancy tables..."

g. The Transmittal requires states to use Social Security tables rather than the more commonly used IRS actuarial tables. "The average number of years of expected life remaining for the individual must coincide with the life of the annuity. If the individual is not reasonably expected to live longer than the guarantee period of the annuity, the individual will not receive fair market value for the annuity based on the projected return. In this case the annuity is not actuarially sound and a transfer of assets for less than fair market value has taken place, subjecting the individual to a penalty. The penalty is assessed based on a transfer of assets for less than fair market value that is considered to have occurred at the time the annuity was purchased." Transmittal 64 to the State Medicaid Manual §3258.9 B.

h. Thus, Congress has mandated that states follow its transfer penalty rules and has specifically delegated the authority to create the transfer penalty rules applicable to annuities to the Federal regulators. Acting pursuant to this Congressional authority, the Federal regulators have developed the rules that states are required to follow and transmitted those rules to Pennsylvania. The use of these rules is mandatory on the states. However, in violation of the federal requirements, the Department has been imposing transfer penalties on some purchases of actuarially sound annuities. While the rules the Department is using in making its determination of when an annuity creates a transfer penalty are unclear and apparently subjective, it is without question that the Department has even imposed transfer penalties in regard to the purchase of actuarially sound immediate annuities purchased by a community spouse.

i. There is no question that the purchase of an actuarially sound immediate annuity by a community spouse can be used to enhance the income and thus the ultimate financial security of the community spouse. In a manner similar to the use of the resource-first methodology, the purchase of a single premium immediate annuity by a community spouse can lower the amount of resources that a community spouse will be required to spend down on the institutionalized spouse's cost of care. No doubt, this is why the Department views the purchase of at least some immediate annuities by a community spouse as a "loophole" whose use the Department wants to discourage.

j. The purchase of a single premium immediate annuity by a community spouse involves two fundamental provisions of Medicaid law.

- First, at the time of application for benefits, the assets of the community spouse are deemed available to the institutionalized spouse, but the income of the community spouse is not. 42 U.S.C. § 1396r-5(c)(1)(A) and 42 U.S.C. § 1396r-5(d)(1)(B). When an immediate annuity is purchased, available resources that would be deemed available to the institutional spouse are converted into an income stream for the community spouse that is not deemed available.
- Second, after the institutionalized spouse becomes eligible for

Medicaid, there is no further deeming of the assets of the community spouse to the institutionalized spouse. 42 U.S.C. § 1396r-5(4) Assets that the community spouse receives after the institutionalized spouse has qualified for Medicaid do not affect the eligibility of the institutionalized spouse for continued benefits.

The result of these two provisions is that a community spouse can purchase an immediate annuity and thereby convert otherwise available resources to an income stream for the sole benefit of the community spouse. This spend down of the couple's assets on the annuity can reduce the assets of the couple to the level needed for the institutionalized spouse to qualify for Medicaid.

k. While community spouses in most states can avail themselves of the option to purchase an actuarially sound annuity as a means of limiting spousal impoverishment, in Pennsylvania, the Department has been hostile to this use of annuities. However, in a recent opinion issued by the Federal District Court for the Eastern District of Pennsylvania, the Court determined that the plaintiff community spouse was likely to prevail on her argument that the Department's position on her purchase of an annuity was in violation of Federal law. (The Department thereupon settled the case and granted the application for Medicaid benefits). See Mertz v. Houstoun, 155 F.Supp.2d 415 (E.D. Pa. 2001).

l. In the Mertz case, DPW had penalized the purchase by a community spouse of an actuarially sound commercial immediate annuity in the same manner as would have occurred if the funds had been gifted. (Actually, the application for MA was initially approved by an understandably confused Lehigh County Assistance Office, but it later rescinded the approval). In support of its denial of benefits, the Department took the position that none of the resources in excess of the community spouse's CSRA could be used to purchase an actuarially sound commercial annuity if the spouse's income already exceeded the MMMNA.

m. In handing down his memorandum opinion, Federal District Court Judge Waldman made the finding that it was likely that Mertz would prevail on her claim against the Department. The Court concluded that "a couple may effectively convert countable resources into income of the community spouse which is not countable in determining Medicaid eligibility for the institutionalized spouse by purchasing an irrevocable actuarially sound commercial annuity for the sole benefit fo the community spouse." Mertz v. Houston, 155 F.Supp.2d 415 (July 30, 2001), p. 22.

n. The Court in Mertz went on to note: "It is not the role of the Court to compensate for an apparent legislative oversight by effectively re-writing a law to comport with one of the perceived or presumed purposes motivating its enactment. It is for the Congress to determine if and how this loophole should be closed." Mertz v. Houston, 155 F.Supp.2d 415 (July 30, 2001), p. 24.

o. It is respectfully submitted that it is also not the Department's role to re-write the law, either by its Office of Legal Counsel on a case by case basis, nor in the proposed §178.174(d).

p. The Department's current post-Mertz policy on the purchase of annuities by community spouses is, at best, unclear. To the best of this writer's knowledge, the Department currently requires County Assistance Offices to submit information regarding annuities owned by community spouses to the Office of Legal Counsel where a decision is made as to whether or not to deny benefits to the institutionalized spouse due to the annuity. The criteria employed by the Office of Legal Counsel in making this determination is unpublished and apparently somewhat subjective. This approach may be effective in discouraging the purchase of annuities by older, conservative, community spouses, especially those who are not represented by competent counsel, but is patently inappropriate and, as noted in Mertz, illegal.

q. With the change to income-first and the accompanying reduction in the protections against spousal impoverishment, the use of annuity purchases by community spouses is likely to increase. (Since community spouses can legally purchase an annuity to protect the assets that would otherwise be protected if the Commonwealth retained the resource-first rule, the Department's cost saving projections are called into serious question). Litigation is certain to continue until the Department sets forth clear, understandable, rules that comply with Federal Medicaid requirements regarding the treatment of annuities.

Recommendation: These Proposed Regulations should articulate clear standards for the treatment of actuarially sound immediate annuities that are consistent with Federal law. These standards should be in keeping with the requirements of Federal law as set out in Transmittal 64 and the Mertz case.

4. *Other Ambiguous Areas in Need of Clarity*. Proposed §178.124 lacks clarity in a number of other respects which will create confusion, difficulty, and unfair and inequitable treatment to applicants for benefits.

a. The Terminology Employed in §178.2 in Creating the Income-First Calculation Methodology in §178.124(b) is Very Confusing, and is Likely to Foster Incorrect Application of the Rules.

The definition section of the regulations, §178.2, uses an array of similar sounding acronyms that are almost certain to confuse applicants and their family members, as well as their professional advisors and County Assistance Office caseworkers. The entire methodology is mind crunching to work through. The difficulty is magnified by the use of similar sounding acronyms:

MAMMNA
MIMMNA
MMNA
CSMMNA

Recommendation: One can sympathize with the difficulty of creating an easily understood method of expressing the income-first methodology in the regulations. This is a difficult set of concepts for the public, and even professionals, to understand. Still, the intrinsic complexity of the concepts underlying the income-first makes it all the more important that the regulations be "written in clear, concise and, when possible, nontechnical language" as required by Executive Order 1996-1. Since the rules still allow for the potential of an enhanced CSRA for the community spouse (if the deemed income from the IS is still insufficient to provide the MMNA), the public needs to be able to understand when they qualify for and should apply for MA. The Department should rewrite §178.2 and §178.124 in a less technical, more understandable, more easily applied fashion.

b. The Consequences of the "Effective Date" are Unclear.

The Department, in the preamble, states that "This proposed rulemaking will be effective upon publication in the Pennsylvania Bulletin as final-form rulemaking." But the consequences of this "effective date" are unclear. For example:

1. What individuals will be affected by the change to income-first? The "snapshot" date for determining the CSRA of the CS is the date of institutionalization of the IS. If the IS is institutionalized before the "effective date", but applies for MA after the "effective date", will the resource-first rules or the income-first rules be applied? Since the required CSRA snapshot date is the date of institutionalization, it appears that this date should be the date for determining whether the CSRA will be expanded for a low income community spouse. But the regulation is silent on this issue.

2. In implementing the resource-first methodology, the Department has entered into stipulated agreements with applicants specifying the enhanced CSRA. The regulations should clarify that all CRSAs established by stipulated agreement are grand-fathered and these individuals and spouses will continue to be governed by the resource-first rules under the Hurly settlement.

Recommendation: The Department should clarify the implications of the effective date of the regulations.

c. The Regulation is Unclear Regarding How the Community Spouse's Income is Determined.

a. The proposed regulation provides that the income of the community spouse considered in determining the minimum monthly maintenance needs allowance and CSRA to which the community spouse is entitled is to include "interest and other income generated by the community spouse resource determined under § 178.123." Yet there are no standards and no methodology provided regarding how this "income" that will be attributed to the community spouse will be determined by the Department. In the past, the Department has seemingly arbitrarily set an "interest rate" to be applied to these spousal resources without any rationale being provided. For a long time, the assumed "interest rate" was 5% at a time when the average one year certificate of deposit was yielding less than 3%.

b. The proposed regulation is unclear as to what assets included in the CSRA are to be deemed to be income/interest producing for the community spouse. For example, how is life insurance with a cash value to be treated? This is a very common asset owned by a community spouse. It may or may not be an available asset depending upon the value of the policies. Are dividends on life insurance policies included as income? If so, to what extent? What are the rules regarding a second car or a vacation cabin or Timeshares and other non-income producing assets that are included in the CSRA? What other assets are included or excluded and to what extent when calculating the income/interest produced for the community spouse?

Recommendation: The Department should provide an objective method of calculating the income/interest rate to be applied to the community spouse resource allowance; it should define clearly exactly what assets are deemed to earn income for the community spouse for this purpose.

5. Policy Issues: In making the proposed regulatory change to income-first, is the Department making a policy decision of such a substantial nature that it should be left to the legislative process?

a. Except for situations involving low income community spouses who request to retain additional resources under the resource-first approach, Pennsylvania provides Community Spouses with only the very minimum resource allowance (CSRA). Only a community spouse with both low income and limited assets can raise the CSRA a little, to provide herself with a little additional income upon the death of the institutionalize spouse. By comparison, our neighboring New York State does follow an income-first approach - but it also provides community spouses with a minimum protected asset allowance of $74,820 versus the Pennsylvania's minimum of $17,856. Wisconsin, the source of the Blumer decision, legislatively established a $50,000 minimum community spouse resource allowance.

b. The change involves a significant cut in benefits to Pennsylvania's neediest low-income seniors. The proposed change is, in effect, a shifting of tax dollars with an increased asset based tax being placed on low income elderly community spouses. Unfortunately, most of the additional dollars paid by the low income community spouses of Pennsylvania will not remain in Pennsylvania but will be passed along to the federal government. This is an inefficient source of savings for the Commonwealth.

c. The savings to Pennsylvania's share of Medicaid spending (46%) are murky at best. Delaying Medicaid eligibility will, to some extent, shift the cost of care not only to the low income spouse, but also to the Commonwealth. For example, the change may actually raise the Commonwealth's cost for prescription drugs. [Once the institutionalized spouse qualifies for Medicaid, prescription drug costs are shifted to Medicaid (46% financed by Pennsylvania) and off of PACE (100% financed by Pennsylvania)]. This type of "cost" shifting, which will result from the change in methodology, was apparently not addressed by the Department in its analysis of costs and savings.

d. The change means spousal impoverishment will no longer be prevented in Pennsylvania, but only delayed until the death of the institutionalized spouse. The change to income-first means that the community spouse will not be permitted to keep additional resources to provide her with the minimum income allowance. Instead, she will have to depend upon the institutionalized spouse's fixed income to raise her up to the level needed to avoid spousal impoverishment. However, when the institutionalized spouse dies, the institutionalized spouse's fixed income is, more often than not, gone. The community spouse then must live on her fixed income plus whatever income can be generated by the reduced level of resources she was permitted to retain. In short, once the institutionalized spouse dies, under the income-first rule, a community spouse will be left impoverished, without either the assets or the income necessary to assure independence. The result is that the switch to an income-first methodology means that, in Pennsylvania, the impoverishment of the community spouse will not be avoided - it will only be delayed.

e. The negative impact on the poor elderly in Pennsylvania will be out of proportion to the resulting savings. As noted above, most of the additional money taken from Pennsylvania's low income elderly will be passed on to the Federal Government. 54% of the "savings" achieved by draining the limited assets of Pennsylvania's low income elderly will be "saved" by the Federal Government, not Pennsylvania.

f. Resource -first protects only low income community spouses whose incomes are well below the minimum monthly standard established by Federal law. In addition to having low income, the community spouse will not qualify for the protection of resources under resource-first unless her resources are also so low that they cannot generate enough additional income, when combined with her fixed income, to raise her to the minimum allowance level. Only if she meets both the low income and low asset requirements will the community spouse be permitted to keep any additional resources under the current rules.

g. The Department could have proposed accompanying the switch to income-first with an increase in the community spouse's minimum CSRA beyond the bare minimum our state currently provides. This is the approach taken by many other states, like New York and Wisconsin that employ income-first. The community spouse can be protected from impoverishment either by using resource-first, or by raising the minimum CSRA. However, the Department suggests Pennsylvania do neither. It appears that the Department is satisfied to prevent spousal impoverishment only during the life of the institutional spouse. It ignores the significant effects on the public health and welfare that will result from the impoverishment of the community spouse AFTER the death of the institutionalized spouse. If we accept the goal of preventing spousal impoverishment, the Department should either retain the resource-first rule, or raise the minimum CSRA.

h. Taking more of the community spouse's limited assets to pay for the institutionalized spouse's nursing home care is short-sighted since the community spouse will need to turn to other public assistance programs to survive once the institutionalized spouse died. The Department has not factored these future costs of supporting the impoverished spouse into its financial analysis.

i. The change will encourage the elderly to get divorced, when one spouse becomes ill, as one of the few means available to avoid community spouse impoverishment.

j. The change will encourage the elderly to employ the risky strategy of giving their assets away in order to protect them from long term care costs. In addition to the negative effects the increase in this planning strategy will have on the elderly, it will negatively impact both the state's Medicaid expenditures and inheritance tax revenues. The Department has not mentioned these future costs in its analysis.

k. Legislation has already been introduced on the subject (H.B. 2829). Other states, including Wisconsin and New York, as noted above, have decided this critical issue by means of legislation, not regulation. Legislation on this issue is so important that the issues of what states can do has gone all the way to the United States Supreme Court. Wisc. Dep't of Health and Family Services v. Blumer, 525 U.S. ____, 122 S.CT. 962; 151 L.Ed.2d 395 (2002).

l. As a policy matter, permitting the low income community spouse to retain assets will reduce the pauperization of the community spouse after the death of the institutionalized spouse. In most cases, the wife survives the husband, and her Social Security and pension income decreases after the death of the husband. If we accept the goal of protecting community spouses, especially the low income widows of Pennsylvania, from severe impoverishment after their husbands' deaths, we need to retain the "resources first" rule.

Recommendation. The proposed change to income-first is a policy decision of such substantial nature that the Department should defer to the Legislature on this issue. The Legislature can best address how Pennsylvania should protect community spouses from impoverishment. The proposed regulatory change will have such a dramatic effect on the health, welfare, and financial security of Pennsylvania's low income elderly that this decision should be made only by the Legislature, not by Administrative action. The Department should withdraw proposed §178.124(b).

Comments Regarding Proposed Section 178.174 (d)
Proposed Changes in the Calculation of Transfer Penalties

A. Background.

When an individual, or the individual's spouse, transfers assets without adequate consideration, and that transfer it not exempt, 42 U.S.C. § 1396p(c)(1) requires that a penalty be imposed. In §178.174(d) the Department proposes to change the way in which these transfer penalties are calculated in Pennsylvania.

B. Issues Raised by Proposed Regulation (§178.174(d)).

Proposed §178.174(d) raises a number of questions and issues, including the following:

(1) §178.174(d) conflicts with mandatory federal requirements because the Regulation seems to impose a penalty on post-eligibility transfers by the community spouse.

(2) §178.174(d) conflicts with mandatory federal requirements and existing Department Regulations by imposing transfer penalties on transfers made exclusively for a purpose other than to qualify for Medical Assistance.

(3) The methodologies proposed in making the transfer penalty calculations are unclear; in particular, the Department should specify the methodology and standards it will employ in determining the penalty divisor.

(4) In revising the transfer penalty provisions, the Department should clarify the treatment of LERPs (Life Estates with Revocation Powers).

(5) §178.174(d) is likely to greatly increase the number and complexity of required reports and other paperwork both for the private sector and the public sector; the burdens and costs of §178.174(d) outweigh the benefits.

(6) §178.174(d) needs clarification as to implications and consequences of the "effective date."

(7) §178.174(d) needs clarification regarding the treatment of actuarially sound annuities.

I will address these issues in turn.

1. *§178.174(d) Conflicts with Mandatory Federal Requirements by Imposing Transfer Penalties on Post-Eligibility Transfers by a Community Spouse*.

a. Proposed §178.174(d) provides that "The period of ineligibility for an individual who is applying for, or receiving MA for NFC as defined in §178.2, including services in an ICF/MR facility, or a level of care in an institution equivalent to NFC, or home or community-based waiver services furnished under a Title XIX waiver and who disposes of assets for less than FMV begins in the month of the transfer provided that the date does not occur during an existing period of ineligibility."

b. Under §178.174(d), an individual is penalized for transfers made by the spouse of the individual. The result is mandated both by §178.174(d)(1) and §178.174(d)(2) and by §178.104(b) which provides that, "A transfer of assets by the community spouse to a person other than the institutionalized spouse is treated and affects the eligibility of the institutionalized spouse the same as a transfer by the institutionalized spouse."

c. By its terms §178.174(d) appears to apply evenly to transfers made after the institutionalized spouse has become eligible for Medical Assistance. The Section specifically states that it applies to an individual who is "applying for, or receiving MA for NFC" (emphasis added).

d. Thus it appears that the Department intends transfer penalties calculated pursuant to §178.174(d) to apply to "post-eligibility" transfers made by either the recipient of MA or the spouse of the recipient.

e. §178.174(d) provides that any transfer (however small) made by a person receiving MA for NFC or the spouse of such person will result in a period of ineligibility for continued MA.

f. Under §178.174(d), a transfer penalty must be applied in the following situation. At the time husband enters the nursing home, husband and wife have total available assets of $50,000. The wife's CSRA is $25,000 and the husband's allowance is $2,400. Thereafter they spend down so that the wife has less than $25,000 in available assets and the husband has less than $2,400. Husband thereupon qualifies for MA. Three months later, wife gives her grandchildren $600 in Christmas presents. Under the proposed regulations, this transfer by the wife will make her husband ineligible for Medical Assistance for a period somewhat in excess of one day. This result, however unreasonable and intrusive, appears to be unequivocally mandated by §178.174(d).

g. The application of a transfer penalty to the gift from the wife to her grandchildren in the above situation is not only unreasonable, it appears to be in direct conflict with Federal statutory requirements, including Section 1924(c)(4) of the Social Security Act (42 U.S.C.A. § 1396r-5(c)(4)) which states:

> (4) Separate treatment of resources after eligibility for benefits established.
>
> During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse.

42 U.S.C.A. § 1396r-5(a) provides that the provisions of this section supersede any other provisions of the law relating to determining transfer penalties.

h. Since the enactment of 42 U.S.C.A. § 1396r-5 there have been several letters issued from the Health Care Financing Administration (formerly called HCFA, now called the Centers for Medicare and Medicare Services or CMS) to the states and to private individuals advising that this section means that no penalties are to be imposed on transfers made by the community spouse after the institutionalized spouse has attained eligibility for Medical Assistance.

(1) For example, in February of 1995, Gary Wilks, then Associate Regional Administrator, Division of Medicaid for HCFA Region VIII, responded to an inquiry on this question as follows:

> "[W}e agree that after eligibility is determined for an institutional spouse (IS), the resources of the community spouse (CS) have no bearing on the

> institutionalized spouse's eligibility. Therefor, a CS who transfers a resource which is in his/her own name, after the eligibility for the IS has been established, does so without danger of affecting the IS's eligibility. This is clearly spelled our in Section 1924(c)(4) of the Social Security Act." (Letter from Gary Wilk, dated February 1995).

(2) Similarly, a letter from HCFA Region 1 Associate Regional Administrator Ronald Preston to Massachusetts attorney Susan H. Levin reiterated that a community spouse's transfer of assets does not affect her institutionalized spouse's eligibility if he is already receiving benefits. Preston wrote in part:

> "Your understanding of Federal statutory requirements is basically correct. Section 1924(c)(4) of the Social Security Act (42 U.S.C. § 1396r-5(c)(4)) concerns the separate treatment of resources after eligibility for benefits is established. This section provides that during the continuous period in which an institutionalized spouse is in an institution and after the month an institutionalized spouse is determined eligible for Medicaid, no resources of the community spouse are deemed available to the institutionalized spouse.
>
> Therefore, transfers of assets for less than fair market value made by a community spouse will have no effect on an institutionalized spouse if accomplished during the continuous period of institutionalization of the institutionalized spouse and after the month in which an institutionalized spouse's Medicaid eligibility is determined". (Quoted in The Elder Law Report, 2/97, Page 10).

i. The inapplicability of transfer penalties to post-eligibility transfers by the community spouse is not only required by Section 1924(c)(4) of the Social Security Act, it is also required by 42 U.S.C. § 1396p(c)(2)(C)(ii) which provides that transfers made "exclusively for a purpose other than to qualify for Medical Assistance" are not subject to transfer penalties. This federal exclusion requirement is included in the existing Pennsylvania regulations at §178.104(e)(3)(ii). It is common sense that if the institutionalized spouse is already receiving Medical Assistance, a transfer by the community spouse of her assets could not have been made for the purpose of qualifying him for Medical Assistance.

Recommendation: Clarification should be added to §178.174(d) to make it clear that transfer penalties do not apply to post-eligibility transfers by community spouses. This clarification is required to bring the section into compliance with mandatory federal Medicaid statutes and the Department's own regulations.

2. *§178.174(d) Conflicts with Mandatory Federal Requirements and Existing Department Regulations by Imposing Transfer Penalties on Transfers Made Exclusively for a Purpose Other Than to Qualify for Medical Assistance.*

a. In the scenario discussed above, assume that the $600 gift to the grandchildren was made by the individual who had already qualified for MA, out of his $2,400 allowance. This transfer is obviously made for a purpose other than to qualify for Medical Assistance, and thus may not be subject to penalty. Only relatively large transfers by an institutionalized individual on MA (e.g. of inherited funds which raise the resources of the MA recipient above the $2,400 limit) should be subject to the transfer penalties mandated by §178.174(d)

3. *The Methodologies the Department Will Utilize in Making the Transfer Penalty Calculations are Unclear; For Example, the Department Should Specify the Methodology and Standards it will Employ in Determining the Penalty Divisor.*

a. §178.174(d)(1) provides that the number of months of penalty is computed based upon the "average monthly cost to a private patient of NFC in effect in this Commonwealth at the time of application." The regulations should clarify:

(1) How does the Department determine this average monthly cost figure? What methodology is used?

(2) How frequently is this average monthly cost figure re-calculated and revised? It should be on some reasonable regular schedule, at least annually.

4. *In Revising the Transfer Penalty Provisions the Department Should Clarify the Treatment of LERPs.*

a. A LERP (Life Estate with Revocation Powers) deed is a deed where the grantor reserves a traditional life estate and also retains the power to sell the property and terminate the remainder interest (i.e. a life estate with power to sell and consume with a vested remainder subject to complete defeasance). If the life tenant does not consume the property or revokes the remainder, then upon the death of the life tenant, the property passes to the remainderman by operation of law. LERPs have been used for many years, in a number of states including Pennsylvania, mainly to avoid probate upon the death of the grantor. It is somewhat similar to naming a beneficiary on a asset, or creating an account that is payable on death.

b. Because Medical Assistance Estate Recovery in Pennsylvania is currently limited to the recovery against the probate estate of the recipient of benefits, assets that do not pass through probate are not subject to Estate Recovery.

c. Since the grantor/life tenant reserves the power to revoke the LERP, common sense says that no transfer of assets occurs when a LERP is created. This is the position that the federal Medicaid authority takes. See State Medicaid Manual, HCFA Transmittal 64 §3258.9. See also, the Department's Pennsylvania Nursing Care Handbook §440.97.

d. There are no Pennsylvania court decisions on the effects of a LERP in the context of whether a LERP creates a transfer penalty in the Medicaid context. However, a LERP case was docketed with the Commonwealth Court, but was settled. Estate of James Grimes v. Department of Public Welfare, Docket No 2062 CD 2001. In Grimes, the Department held that the creation of the LERP was a transfer of a remainder interest and imposed a transfer penalty. The amount of the transfer was calculated as if the grantor did not retain any power to revoke the remainder interest.

e. At present, it is unclear whether the Department will impose a transfer penalty if a LERP is created. This is a difficult issue, and the Department's desire to limit the use of LERPs to avoid probate, and thus to avoid Estate Recovery, is understandable. However, the Department should establish a rule regarding the effect of LERPs for purposes of transfer penalties under §178.104 and proposed §178.174(d) rather than to continue to decide LERP cases on an ad hoc basis without regulatory standards.

5. *There Will Be an Unreasonable Paperwork and Record Keeping Burdens Resulting from the Imposition of Fractional Month Penalties Under Proposed §178.174(d)(2).*

a. Under §178.174(d)(2) a penalty will be imposed on any pre or post-eligibility transfer of assets by either the MA recipient or his or her spouse. Thus, if the community spouse gives $200 in presents to each of her three grandchildren for Christmas, she and her husband are made ineligible for continued MA for 1.129 days ($600/$5313= 1.129). The couple will have to report this transfer. If her husband is already receiving MA, either for a nursing facility or for home care, he will be knocked off the program for 1.129 days, and then will have to reapply. If the applicant is receiving home care services under the Waiver or Bridge programs, home care providers will have to be notified to cease providing the services pursuant to the care plan for the requisite penalty period. Care managers for the Area Agency on Aging will have to revise their care plans accordingly. If the MA recipient is institutionalized, the facility will have to revise its billings after it receives appropriate notice from the County Assistance Office. For example, prescription drugs provided to the nursing facility resident will not be covered by MA for that day. MA limits on the costs of those drugs will not apply. Since the institutionalized individual with have limited or no assets, the facility will need to seek payment from the community spouse for services and supplies provided during any short period of ineligibility. The community spouse may or may not be under any obligation to pay the facility. Is "paperwork ,nightmare" too strong a phrase to use to describe the Department's proposal to apply fractional penalties for any transfer proposal as set forth in §178.174(d)(2)? I don't think it goes far enough.

b. Under the regulations, a penalty is to be imposed on any transfer of any value. Thus a gift of an item valued at even $50 will have to be reported and will create a transfer penalty of .282324 days = 6.775 hours (if it is a 30 day month - will the number of hours of penalty vary if it is a 31 day month?). This is the result mandated by the proposed §178.174(d)(2).

c. The intrusiveness of requiring the spouses of MA recipients to report even small gifts to church or family members is even more offensive given that much of this reporting and paperwork burden is placed on our already financially and emotionally overwhelmed elderly nursing home resident or home care recipient and his or her spouse. Significant burdens are also placed on others involved in the care of the MA recipient. It is hard to imagine that any savings to the Commonwealth are not far outweighed by the costs and burdens that will be placed on the regulated community.

d. As noted above, §178.174(d)(2) will penalize post-eligibility transfers by community spouses in violation of Federal law. At a minimum, §178.174(d) must be revised to make it clear that post eligibility transfers by the community spouse create no penalty for the MA recipient spouse.

e. The Regulations should clarify how the proposed fractional penalty will be applied. For example, will there be partial days of ineligibility? Will the penalty be different in a 28 day month vs. a 31 day month? When will the penalty be imposed? What transfers must be reported?

Recommendation: The Department should consider more reasonable alternatives that will save the state Medicaid dollars while avoiding the paperwork nightmare which is sure to result from the imposition of partial months of ineligibility for any small transfer of assets. My recommendation is that the Department stay with the simplicity of the current calculation of penalties in whole months. If the Department is convinced that fractional month penalties must be implemented, here are several suggestions as to how it might be achieved while minimizing, to some extent, the burdens and costs involved.

a. One alternative would be to keep the penalty for fractional months as specified in proposed section §178.104(d)(1), but only if the total transfer is large enough to impose a penalty in excess of one month. This would mean, for example, that a $6,000 transfer would create a penalty period of 1.129 months. To accomplish this change, proposed § §178.104(d)(2) which imposes penalties on small transfers of less than the penalty divisor (currently $5,313) would be deleted. This change, while retaining fractional month penalties for significant transfers, would avoid the paperwork and other costs and complications involved with imposing penalties of very small gifts. It would achieve most of the Department's goals without the problems.

b. Another alternative would be for the Department to impose penalties only if the total transfers in one month amount to 50% or more of the monthly penalty divisor. The current penalty divisor is $5,313. If this 50% or more methodology were utilized, small gifts would be ignored. But large gifts, in excess of $2,606 (½ of the penalty divisor) would result in a penalty. This would avoid the complexities and burdens of imposing penalties on the kinds of very small transfers that occur at Christmas and otherwise in normal life. To keep things simple, the penalty imposed on a non-exempt transfers of between $2,606 and $5,312 could be ½ month.

c. Another alternative would be for the Department to impose penalties only if the total transfers in a one month exceed a certain value. For example, transfers of $3,000 or under could be exempted meaning that small gifts would be ignored. This also would avoid many of the complexities and burdens of imposing penalties on very small transfers. Language similar to the following could be utilized:

> A person who is not in a pre-existing penalty period may transfer $3,000 per month without the transfer affecting the person's eligibility for MA or status as an MA recipient. However, persons who are in a penalty period are not permitted to make transfers and will have the amount of any transfers added into their penalty period calculation.

6. *The Regulations Need Clarity as to Implications and Consequences of the "Effective Date."*

a. The Department should clarify the effect of the "effective date" of these regulations in regard to transfers occurring prior to the effective date. §178.174(d) should make it clear that fractional month penalties apply only to transfers occurring after the effective date.

7. *§178.174(d) Needs Clarification Regarding the Treatment of Actuarially Sound Annuities.*

a. As presented above in my comments regarding Proposed § 178.124 (b) - the change to income-first - the Department needs to address its treatment of actuarially sound annuities. In addition to providing for the treatment of such annuities when purchased by a community spouse, the Regulations should specify under what specific conditions the purchase or ownership of an annuity by the married or unmarried applicant for Medical Assistance will create a transfer penalty under § 178.174 (d) and how the penalty is calculated. The standards should conform to the requirements of Federal law as discussed in the opinion in the Mertz case, cited above.

Comments Regarding Proposed Section 181.452(d) Proposed Changes in the Deductibility of Medical Expenses and Home Maintenance Expenses

While I don't contest the Department's authority to make the changes set forth in Proposed §181.452(d)(5)(iii) and by deletion of §181.452(d)(6), I do question the wisdom of these changes given the adverse effects they will surely have on the public interest in Pennsylvania.

a. The Department proposes to limit the income deductibility of unpaid medical expenses. If the MA recipient is not allowed to pay unpaid medical expenses in excess of $10,000, then the medical providers (mainly nursing homes) will have to write-off many charges. Is it good policy to take dollars from our Pennsylvania health care providers and pass along 54% of those funds to the federal government?

b. §181.452(d)(5)(iii) should make it clear that this change applies only to unpaid medical expenses incurred after the effective date of the regulatory change.

c. The Department proposes to eliminate the home maintenance deduction for short nursing home stays through deletion of §181.452(d)(6). This change will apply mainly to individuals who own their own homes, but have virtually no other assets. All but $30 a month of the institutionalized MA recipients income must be contributed towards the cost of his care, leaving neither income nor assets with which to pay expenses such as local real estate taxes and insurance. The proposed change means that these individuals will no longer be able to keep enough of their income to pay school and other local taxes, or to insure their homes. Under this proposed change, 54% of the money that would have gone to local tax authorities or to insure the home, will instead be passed on to the federal government. Is this good policy for Pennsylvania?

Thank you for your attention to the complicated issues raised in this letter. I hope that these comments will assist the Department, the IRRC, and other reviewers in evaluating the proposed regulations and hopefully creating a more reasonable, rationale, legal, equitable, and workable system.

I appreciate the opportunity to comment on the proposed regulations, and your consideration of my concerns. If there are questions regarding these comments, or if I may be of assistance in any way, please do not hesitate to call on me.

Sincerely,

Jeffrey A Marshall

Jeffrey A. Marshall, J.D. CELA*

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

The Honorable Dennis M. O'Brien
House Committee on Health and Human Services
Pennsylvania House of Representatives
P.O. Box 202020
Harrisburg, PA 17120

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

*Certified as an Elder Law Attorney by the National Elder Law Foundation pursuant to authorization by the Pennsylvania Supreme Court

Southeastern Pennsylvania Original : 2249

Alliance of Adult Day Services

Office of Income Maintenance
Bureau of Policy

NOV 0 5 2002

REFER TO: Karole Aldridge ~~[illegible]~~
OLC
Hoover
File

October 31, 2002

14-478-40

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

Dear Mr. Zogby:

On behalf of Southeastern Pennsylvania Alliance of Adult Day Services, I thank you for the opportunity to comment on the proposed regulations for the income-first rule and the elimination of the home maintenance deduction. We oppose these proposed regulations. These changes will not save Pennsylvania money but will actually increase costs. The changes are not in the public's best interests.

To begin, section 178.124 requires Pennsylvania to utilize an income-first approach when calculating the community spouse's resource allowance. Shifting to an income-first approach when determining Medicaid eligibility is bad policy. The Department of Public Welfare (DPW) will likely not see savings, but rather, could incur additional costs with this policy implementation through increased monthly payments to nursing facilities to compensate for residents' loss of income.

Both the income-first and the resource-first methods provide the same outcome of providing the community spouse needed income while the institutionalized spouse is alive. However, with the income-first approach, when the resident dies the community spouse immediately loses needed income and can quickly find themselves impoverished. This policy will particularly have a negative impact upon older women. When a resident dies, the use of the resource-first approach means that a community spouse will not lose her source of income and can maintain a basic standard of living.

Section 181.452 proposes the elimination of the home maintenance allowance. The elimination of the home maintenance allowance will clearly translate into an increase in expenditures for the Commonwealth. The home maintenance deduction is used by individuals who are admitted to a nursing facility and have been certified by their physician as in need of a short-term nursing home placement. The current regulations allow for a deduction equal to the current SSI level of $574.20 per month from the resident's cost of care and cannot exceed six months. There is no doubt that nursing home residents who rely on Medicaid, and intend to return home, would lose their homes and be forced to stay in the nursing facility at the state's expense. Medicaid recipients are poor. The current $30 per month personal needs allowance provided to nursing home residents on Medicaid is clearly not enough money to maintain a home or an apartment.

For many reasons, this policy is bad for consumers and the Commonwealth. Eliminating the home maintenance allowance is counterproductive to the goal of shifting the delivery of long term care from institutions to the home and community. If implemented, it will cause an increase in Medicaid expenditures for continued payment of nursing facility care.

We hope you will consider our concerns and decide to oppose implementing these regulations.

Sincerely,

Francine Fineman

Francine Fineman
President

14-478-23

ORIGINAL: 2299

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INDEPENDENT REGULATORY REVIEW COMMISSION

OFFICE
OF THE
PRESIDENT

100 SOUTH STREET / POST OFFICE BOX 186 / HARRISBURG, PA 17108-0186 / (717) 238-6715 • FAX (717) 238-1204

TIMOTHY J. CARSON

October 30, 2002

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

Office of Income Maintenance
Bureau of Policy

OCT 31 2002

REFER TO: Willie
OLC
Hovey
File

Re: Proposed Regulation #14-478
Long Term Care Income First Rule

Dear Mr. Zogby:

I am writing on behalf of the Pennsylvania Bar Association (PBA) to comment on the above-referenced proposed regulation. Specifically, the PBA wishes to comment on the portion of the proposed regulation dealing with the change from a resource first approach to an income first approach.

On October 7, 2002, the PBA adopted a Resolution opposing any proposed regulations that would change Pennsylvania to an income first approach. This Resolution was in response to the inclusion in the Governor's Regulatory Agenda of a proposal to amend 55 Pa. Code Chapters 178 and 181 to change the eligibility requirements for applicants and recipients in long-term care facilities such that Pennsylvania would become an income first state. The proposed change to an income first approach has now been set forth in proposed regulation #14-478 that was published in the Pennsylvania Bulletin on October 5, 2002.

Pennsylvania Medical Assistance regulations currently allow a community spouse whose income is below a federally established minimally acceptable level to retain an additional amount of the resources owned by the community spouse and the institutionalized spouse. The retained resources enable the community spouse to have sufficient savings to support him or herself after the death of the institutionalized spouse. The proposed change to an income first approach would significantly impact the financial stability of low-income community spouses by disallowing the allotment of additional resources, and thereby reducing the resources available to the community spouse to generate needed monthly income.

The change to an income first approach would be financially devastating for low-income community spouses who are most in need of access to their savings. As such, the PBA opposes promulgation of Proposed Regulation #14-478.

With regard to the other proposed changes set forth in Proposed Regulation #14-478, we first became aware of them upon publication in the Pennsylvania Bulletin. Due to the limited response time available and the required procedures of the PBA, we are not able to adopt a position on those changes. Our silence on the other issues raised in the proposed regulation should not be construed as approval.

Thank you for your time and consideration of these comments.

Sincerely,

Timothy J. Carson

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

ORIGINAL: 2299

cc: Hicks
Noecker
file

charged 9 am
place respond
11/4/02

176978

DEPUTY SECRETARY FOR
INCOME MAINTENANCE
'02

Department of Public Welfare
Refer To:

#14-478-50

October 28, 2002

Department of Public Welfare
Refer To: Rogers
app action -

Hicks (OIM)
approp action

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INDEPENDENT REGULATORY
REVIEW COMMISSION
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cc: Houstoun
Eckley
Hicks
John
Kane

Feather Houstoun, Secretary
Department of Public Welfare
0333 Health and Welfare Building
Harrisburg, PA 17105

Dear Secretary Houstoun:

We understand we have a 30-day comment period to submit responses to your proposed regulations regarding the "Income First" rule as it applies to the nursing home plan before they are published as final rulemaking.

Many residents of the Millersburg area are very disturbed with the "Income first" approach to the nursing home plan attached to the budget.

This is simply a means of taking hard-earned assets from senior citizens who have worked all their lives for retirement. To add this "Income First" approach to the budget is just another burden for seniors; considering the legislators voted themselves FREE LIFE-TIME HOME PERPETUAL CARE for themselves and their wives. For seniors to consider buying this insurance it would be prohibitive.

We strongly urge you to do everything in your power to prevent this injustice from happening to our senior citizens.

Thank you for your consideration in this matter.

Sincerely,

Yvonne J. Deppen
James H. Deppen
P.O. BOX 27
HALIFAX, PA 17032-0027

Office of Income Maintenance
Bureau of Policy

NOV 07 2002

REFER TO: Karole Aldridge
Willie
OLC
Homer
File

PS - We pay TAXES too!!

#14-478-24

B/H 398

176944

Original; 2299

DEPUTY SECRETARY FOR
INCOME MAINTENANCE

Department of Public Welfare
Refer to: Zogby
cc: Hicks

Due 11-14

OFFICE OF THE SECRETARY
OF PUBLIC WELFARE
REF. Hicks (OIM)
2002 OCT 30 A 10:15
RECEIVED

Houstoun
Eckley

October 28, 2002

Feather Houstoun, Secretary
Department of Public Welfare
0333 Health and Welfare Building
Harrisburg, PA 17105

Dear Secretary Houstoun:

This letter is in response to your letter dated October 4, 2002 regarding the 30-day comment period to your proposed regulations regarding the "Income First" rule as it applies to the nursing home plan before they are published as final rulemaking.

Many residents of the Millersburg area are very disturbed with the "Income first" approach to the nursing home plan attached to the budget.

This is simply a means of taking hard-earned assets from senior citizens who have worked all their lives for retirement. To all this "Income First" approach to the budget is just another burden for seniors; considering the legislators voted themselves FREE LIFE-TIME HOME PERPETUAL CARE for themselves and their wives. For seniors to consider buying this insurance it would be prohibitive.

We strongly urge you to do everything in your power to prevent this injustice from happening to our senior citizens.

Thank you for your consideration in this matter.

Sincerely,

Dede Merena
Joseph Merena

Mr. and Mrs. Joseph Merena
431 Berrysburg Road
Millersburg, PA 17061

Office of Income Maintenance
Bureau of Policy
OCT 31 2002
REFER TO: Willie
OLC
Hoover
File

Original: 2299

ALZHEIMER'S ASSOCIATION

Someone to Stand by You

ALZHEIMER'S ASSOCIATION

Pennsylvania Public Policy Coalition

2002 NOV -6 PM 3:23

REVIEW COMMISSION

14-478-29

Office of Income Maintenance
Bureau of Policy

NOV 04 2002

REFER TO: Karole Aldridge
Willie
OLC
Hoones
File

Chapter Offices

Alzheimer's Association
Greater PA Chapter
2001 N. Front Street
Building 2, Suite 321
Harrisburg, PA 17102
(717) 232-3580

Alzheimer's Association
Delaware Valley Chapter
100 N. 17th Street,
2nd Floor
Philadelphia, PA 19103
(215) 561-2919

Regional Offices

Northwestern Region
110 West 10th Street
Suite 212
Erie, PA 16501
(814) 456-9200

Greater Pittsburgh Region
Landmark Building
1 Station Square
Pittsburgh, PA 15219
(412) 261-5040

Laurel Mountains Region
1011 Old Salem Road
Suite 207
Greensburg, PA 15601
(724) 837-9570

Northeastern Region
Kirby Health Center
71 N. Franklin Street
Wilkes-Barre, PA 18701
(570) 822-9915

October 28, 2002

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

Dear Mr. Zogby:

The Alzheimer's Association Public Policy Coalition of Pennsylvania is writing to comment on the proposed regulations revising the financial requirements to qualify for Medical Assistance payment for long-term care services that were published in the Pennsylvania Bulletin on October 4, 2002. 32 Pa. B. 4854 (October 4, 2002). Although the proposed rulemaking encompassed several changes, this comment is limited to the rules governing the method of computing the available income and resources between spouses, in essence, implementing a rule that has become known as the "Income-First Rule." [1]

The proposed rulemaking is not in the public interest and should not become final for the reasons that follow because: (i) it represents a policy decision of such a substantial nature that it requires legislative review; (ii) the economic and fiscal impact as estimated by the Department even if realized is so small that retaining the present system is both feasible and desirable; and (iii) the regulation as presently drafted is confusing and lacks clarity and should not become final in its current form regardless of the policy considerations involved. See, The Regulatory Review Act, 71 P.S. §§745.5(e)(1)(3)&(4).

The Department should defer rulemaking in this area until after the General Assembly has had the opportunity to examine the issues thoroughly and to act upon the countervailing values involved.

[1] The rulemaking proposed to change the rules governing i) the allocation of income and resources for married couples; ii) the calculation of periods of ineligibility due to transfers for less than fair consideration; iii) limits on unpaid medical expenses; and iv) the home maintenance deduction. The Coalition expresses no view on these other changes except to note that the proposed change to the rules governing the calculation of periods of ineligibility address a legitimate concern which has been the object of serious abuse in the past.

I. INTRODUCTION

The Department proposes to make a change in the methodology it uses to determine eligibility for married couples because among other things it claims the current method is "more generous than required by Federal statute or regulation,"[2] "it will protect benefits for those in greatest financial need" and "it will help maintain the current level of coverage for current recipients and require those with available resources to assume greater financial responsibility for their care." The Department's proposal will accomplish none of these things. Instead, the Department's proposal will hurt the most in need, it will encourage those with greater available resources to engage in estate planning allowing them to escape altogether financial responsibility and by the Department's own estimates it will result in little if any savings. It may even result in greater overall spending, thereby placing greater strain on the Department's ability to accomplish its mandate.

A. Background - Income First vs. Resource First

The method by which the Department calculates available income and resources between spouses has its origins in what are familiarly known as the "spousal impoverishment provisions" of the Medicare Catastrophic Coverage Act of 1988. 42 U.S.C. §1396r-5. The Department's discussion of the rules and the evolution of the current practice that is contained in its proposed rulemaking is accurate and need not be repeated here. For a concise explanation of these provisions, please refer to *Wisconsin D.H.F.S. v. Blumer*, 534 U.S.473,493(2002), (J. Stevens with whom J. O'Connor & J. Scalia join dissenting.)

The current regulation, 55 Pa. Code §178.124(b)(2), which is not followed because of the Hurly settlement, is taken almost verbatim from the language contained in the State Medicaid Manual §3262.3.[3] *Compare* 55 Pa. Code §178.124(b)(2). The lack of clarity contained in that manual section spawned this controversy. That fanciful bureaucratic construction of the statute was then replicated in many states (but by no means the majority as the Department suggests) and has

[2] It should be noted that the spousal impoverishment provisions grant states some flexibility to set more generous standards in allocating income and resources between spouses than the minimums set by Congress. Pennsylvania, where these choices are available, has uniformly elected to establish only the **minimum** standards.

[3] State Medicaid Manual §3262.3 provides: Redeterminations of Eligibility for Institutionalized Spouses. – Pending publication of regulations, states must deduct spousal allowance from resources held in the name of institutionalized spouses from the time of the determination of eligibility until the first regularly scheduled redetermination of eligibility. Community spouses' resources are not deemed to be available to institutionalized spouses. Institutionalized spouses's resources remaining after the deductions of spousal resource allowances are compared to the appropriate eligibility resource standard for one person.

When either member of a couple establishes that income generated from resources deducted as a community spouse's spousal allowance is inadequate to raise the community spouse's income to the minimum amount to be deducted as a maintenance allowance in the post-eligibility determination, the state must substitute the resource amount calculated in subsection B, step 2., for amounts state hearings officers determine to be adequate to provide the minimum monthly income allowance. There are no substitutions when institutionalized spouses do not make available monthly income allowances to community spouses.

When there are changes in the amount of resources following the initial eligibility determination, recalculations of resource eligibility are made of institutionalized spouses, but spousal resource allowances are deducted in determining eligibility until the first regularly scheduled redetermination of eligibility under 42 CFR §435.916.

since been buttressed by the various courts that have reviewed the issue, culminating in the Supreme Court decision in *Blumer*. It is respectfully submitted, that the Supreme Court's decision is itself the product of political expediency masquerading around as "[in] the Spirit of Federalism." See, *Wisconsin v. Blumer*, 534 U.S. 473, 505 (2002) (J. Stevens, dissenting.)

As a result of the ill conceived Federal administrative action, the carefully articulated policy protections established by Congress which were to take effect in all states, See, H.R. Rep. No. 100-105(II), 100th Congress 2nd Sess.4, reprinted in 1988 U.S.C.C.A.N. 857,892, have been widely eviscerated by state administrative action such as the one proposed here, without thoroughly examining the costs - human and economic, pro or con and in a complete legislative vacuum.

B. Agency Authority

The Department of Public Welfare unquestionably has the statutory authority to promulgate regulations implementing the spousal impoverishment provisions of the Medical Assistance Act. Given the decision of the U.S. Supreme Court in *Blumer*, it cannot be said the proposed rule is contrary to the intention of Congress in enacting the statute - **as construed by the Court**. However, as previously submitted and for the reasons expressed in the discussion that follows, the rule represents a policy decision of such a substantial nature it demands review by our General Assembly.

II. THE PROPOSED RULE IS NOT IN THE PUBLIC INTEREST

Pursuant to the Regulatory Review Act, 71 P.S.§§745.5(d),(e), the Independent Regulatory Review Commission, after first satisfying itself the agency has not exceeded its statutory authority nor acted contrary to the intention of the legislative body in enacting the statute, must determine whether the rule is in the public interest.

In making this determination, the Commission shall consider, several criteria, among them: (A) whether the regulation represents a policy decision of such a substantial nature that it requires legislative review; (B) the economic and fiscal impact, including in particular, whether lesser or other standards are more desirable and feasible, and (C) the clarity and reasonableness of the regulation. 71 P.S. §§745.5(e)(1)(3)&(4).

The regulation at issue here fails to satisfy any of these criteria.

A. The Regulation Represents a Policy Decision of a Substantial Nature Requiring Legislative Review

As previously stated, the income-first rule originated from an administrative interpretation which, in the words of the agency director involved, **"...was not specified by the statute and as such is a 'derived' policy."**[4] The policy was first articulated by Congress. It unfortunately has been transmogrified by state agencies and the courts into something entirely different and now known as the income first rule. Notwithstanding this, because of the substantial nature of the rights involved, it should not be the subject of agency rulemaking in Pennsylvania. Instead, the Pennsylvania General Assembly should review this policy to determine how best to balance the competing considerations involved.

The income-first methodology touches upon fundamental family law issues, health care policy

[4] Memorandum from Medicaid Bureau Director Sally Richardson (March, 1994)(emphasis added.)

concerns and principles of fundamental fairness to which the Department has not given serious consideration. It claims this change will protect the most in need. That claim is dubious. Consider the following:

- In 1993, the median net asset worth of married couples where the head of household was 65 years of age or older was $129,790 - including home equity. Excluding home equity, the net asset worth was $44,410.[5] In 1991, one year of nursing home care at the private rate exceeded the nonhousing assets of more than half the elderly.[6]

- Statistics establish that female community spouses are more likely to be victims of the income first rule since their male counterparts are less likely to have insufficient income. In 1991, two-thirds of the 13.7 million retirees who received pension benefits in addition to Social Security were males.[7]

Given the typical older married couple has $45,000 of available assets, the couple under the income first rule will pay privately for less than 4 months[8] and then will become eligible for Medicaid. However, because of the income first rule, half of these resources will have been spent -- though not necessarily on the nursing home.[9] What happens when the institutionalized spouse passes away leaving his wife in the community surviving? The Social Security income of one spouse or the other (whichever is less) is terminated leaving the community spouse with less than the minimum income guaranteed by Congress' original intention, with insufficient resources remaining to make up the difference.

What happens if the couple is the product of a second marriage[10] and the children of the institutionalized spouse refuse, for whatever reason, to make available the income needed to raise the community spouse's income to the guaranteed level? Does the community spouse have any recourse to obtaining Social Security income to realize the promise of Congress to escape impoverishment? The answer is unfortunately - No. In *Robbins v. DeBuono*, 218 F. 3d 197 (2d Cir. 2000), the Second Circuit in this context held that the Social Security income of an

[5] U.S. Census Bureau current Population Reports, Household Economic Studies, P70-47, Asset Ownership of Households: 1993.

[6] Spellman and Kemper, Lifetime Patterns of Payment for Nursing Home Care, Medical Care, Vol. 33, No. 3, pp. 280, 281(1995).

[7] U.S. Bureau of the Census. Current Population Reports, Special Studies, P. 23-190, 65+ in the United States, U.S. Government Printing Office, Washington, D.C., 1996.

[8] The average monthly cost of care in Pennsylvania in 2002 was $5318.

[9] The Department is under the seriously mistaken impression that a change to the income first rule will force couples to use resources for the nursing home that otherwise would be protected under current methodology, thereby benefitting the state. In a letter dated Oct. 4, 2002 to Diane Menio, Executive Director of CARIE, Linda A. Hicks, Acting Deputy Secretary of DPW, posits a couple with $100,000.00 of resources and a community spouse maintenance needs allowance (minimum monthly maintenance needs allowance in Federal terms) of $1,500.00 and opines that under current rules this would allow a community spouse with $1,100 per month of personal income to use $47,600 of the resources to purchase an annuity to make up the income differential, but under the income first rule, that money would be available to pay the nursing home. However, the Department should be informed that the "excess" resources may be used by the community spouse in any manner she chooses such as making needed repairs to her home, setting aside money for funeral and burial, making a gift to her children or using the money to purchase a commercial annuity to help maintain herself in the community. The Department can reasonably expect less than half that amount will be used for the nursing home. See fn. 11 infra.

[10] Second marriages are commonplace among the elderly.

institutionalized spouse is not subject to legal process and therefore the state of New York violated his civil rights by allocating his income to his wife. This case raises the question of whether the Department's proposed rulemaking is even valid or enforceable for most couples whose retirement income consists solely of Social Security.

Contrary to the assertions of the Department, those couples with greater available resources will continue to take advantage of planning opportunities to preserve significant portions of their estates.[11] These individuals are largely unaffected by the Department's proposed rulemaking.

Pennsylvania practice in its present form carefully balances the legitimate fiscal concerns of the state with the substantial rights of the persons affected. The policies embodied in current practice should not be revised without legislative review.

B. The Fiscal and Economic Impact is so Small that Retaining the Present Methodology is Feasible and Desirable

The Department has estimated in its proposed rulemaking that the savings for the state gained by the changes will be $3.171 million in Fiscal Year 2002-2003 for all four changes. In the Governor's Executive Budget for Fiscal Year 2002-2003 prepared by the Department for the Appropriations Committee Hearings Feb. - March 2002, the Department estimated the savings from implementation of the income first rule at only $1.151 million for the fiscal year. Extrapolating theses savings for a full year (this fiscal year is half passed) the Commonwealth would realize a savings of only $2.302 million per year in the years ahead. Given the fact that only those in the greatest financial need will be affected by the change to the income first rule, that more well off elderly will be encouraged to employ more aggressive planning opportunities to preserve assets and that the projected savings is, to say the least, trifling, it makes little sense to scrap a system that has functioned well and has faithfully adhered to the original purposes of the Act. Any change under these circumstances should be left to the legislature.

C. The Proposed Rulemaking is Confusing and Lacks Clarity

The proposed rulemaking to implement the income first rule amends Chapter 178 of Title 55 of the Pennsylvania Code by adding several definitions in 55 Pa. Code §178.2 and by repealing 55 Pa. Code §178.124(b)(2) and replacing it with a new section (b)(2) consisting of eight subsections, three of which are then subdivided further into two subparts. These changes are poorly drafted, difficult to comprehend, largely unnecessary, inconsistent with other sections of the Pennsylvania Code and in one particularly important respect, in conflict with the Federal statutory scheme. They should not become final in their present form regardless of the policy considerations involved.

In general, the definitions proposed by the Department add terms that are different from the ones used in the Federal statute to describe the same concepts, or utilize the same terms that are used in the Federal statute but defined to describe different concepts. One definition adds a new concept which has no basis in and is in conflict with the Federal scheme. These new definitions are largely unnecessary and should be discarded. It is entirely unclear why the Department does not simply employ the Federal terms.

[11] See, e.g., Avoiding the Medicaid Trap, 3d.ed. Budish, Armond, Avon Books (April 1996). See, also, *Mertz v. Houston*, 155 F. Supp. 2d 415 (E.D. Pa. 2001). (A commercial annuity was not an available resource for purposes of Medical Assistance eligibility and the purchase of it did not result in any period of ineligibility even though it may have been done for the purpose of qualifying for medicaid).

In particular, the following should be noted:

(1) The Minimum Monthly Maintenance Needs Allowance (MMMNA) under the Federal statute, 42 U.S.C. §1396r-5(d)(3) corresponds to the Department's proposed new term Community Spouse Monthly Maintenance Needs Amount (CSMMNA); however, the same term used in the Department's proposed scheme (the MMMNA) corresponds only to a component of the Federally defined concept of the same name.

(2) The Department's proposed new term - Monthly Maintenance Need Allowance (MMNA) corresponds to the Federal term Community Spouse Monthly Income Allowance (CSMIA). 42 U.S.C. §1396r-5(2).

(3) The CSMMNA proposed by the Department in its definition incorporates the term *monthly shelter expense*, but if it is to conform to the Federal concept as it appears to be intended, it should instead incorporate the term *excess shelter amount* of which the term *monthly shelter expense* is only a component.

(4) The Department has proposed an entirely new concept called by the term Maximum Monthly Maintenance Need Allowance which is defined as "the maximum amount of income **permitted to be protected** to prevent the community spouse from being impoverished..." However, the community spouse is permitted to retain all of her income regardless of the amount. The Department's definition incorrectly implies there is a limit to the amount of income a community spouse may retain. This implication should be eliminated.

In addition to all of the foregoing, the Department's proposed rulemaking amends 55 Pa. Code §178.124(b)(2), by incorporating new terms and concepts but does not amend 55 Pa. Code §181.452(d)(2) which governs the same subject matter. As a result, the proposed regulation is inconsistent with that section and creates confusion.

The Medicaid statutory scheme is to begin with extremely complex. It does not need to be further complicated by the Department's use of unnecessary jargon. It is respectfully submitted that the Department's objective of implementing the "income first rule" can be accomplished with much greater clarity with relatively little additional language.

For all of the foregoing reasons, the proposed rulemaking with respect to the way the Department computes available income and resources for married couples should be discarded altogether until after the General Assembly can review the policy.

Thank you for your consideration.

Cheryl L. Cook
for Diane M. Balcom, Chair

#14-478-22

PATTERSON & KIERSZ, P.C.

ATTORNEYS AT LAW

239-B East Main Street
Waynesboro, PA 17268-1681
717-762-3170
Telefax 717-762-0988

20 West Baltimore Street
Greencastle, PA 17225-1408
717-597-3180
Telefax 717-597-5121

Stephen E. Patterson
Gregory L. Kiersz
R. Thomas Murphy

Toll Free 800-261-1194
E-mail pklaw@onemain.com

October 25, 2002

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

Office of Income Maintenance
Bureau of Policy

OCT 29 2002

REFER TO: Willie
OLC
Hoover
File

Re: Department of Public Welfare
Proposed Regulations: Protection
of "Community Spouse's" Quality of
Life, When the Ill Spouse is Admitted
to a Nursing Home

Proposed Amendment to 55 PA Code Chs. 178 and 181
Pennsylvania Bulletin, Vol. 32, No. 40, Published
Saturday October 5, 2002

Dear Mr. Zogby:

We are Elder Law Attorneys practicing in Franklin County, Pennsylvania. Our firm has represented scores of elderly clients, whose spouse's have been admitted for long-term nursing home care.

Pennsylvania currently follows a Federally approved policy known as "Resource First." The above Regulation purposes to eliminate the "Resource First," policy and in it's place substitute an "Income First" policy for Community Spouses who remain healthy and continue to live at home.

The Regulatory change from "Resource First," to "Income First," would be a financial disaster for low-income and low-resource healthy community spouses who are most in need of protection of their full "resource savings."

Probably the best way to describe our concern is to give you two examples using the same fact situation:

Basic Fact Situation: Husband, age 70, has dementia and has Social Security income of $600.00 net per month, plus employer paid pension income of $500.00 net per month. Husband's combined monthly income is $1,100.00. Husband's pension ends at Husband's death and does not "carry over" to his surviving spouse. Husband has been diagnosed with Alzheimers, and will require nursing home admission in the near future. Wife, age 70, receives Social Security in the sum of $300.00 net per month. The couples' total "countable" combined assets are $70,000.00 in checking, savings and certificates of deposit. H&W own their own home and have no debts.

Wife is no longer able to care for her Alzheimers' husband at home. His physical health is pretty good, but he cannot transfer and is incontinent, and wife is becoming exhausted trying to care for her husband.

Resource First (Current Policy): If husband is admitted to a nursing home, wife would be allowed to keep the $70,000.00 in savings, which currently generates interest, at the rate of 3% per annum. The $70,000.00 net resources, would generate monthly interest income for the benefit of the wife at the rate of $175.00 interest income per month. The wife would therefore have her own Social Security of $300.00 per month, plus $175.00 per month for a total guaranteed monthly income of $475.00. Under current Regulations, the "Minimum Monthly Maintenance Needs Allowance," of the Community spouse is $1,493.00. The wife's "income shortfall," would be made up by having $1,018.00 from the husband's Social Security and pension, made available to her. Under the current "Resource First" rule, the wife living at home would preserve her "nest egg" of $70,000.00, for her future retirement and 15 years of wife's future anticipated life expectancy. Upon her husband's death, which would be anticipated in several years after his admission to the nursing home, the wife would "take over," her husband's Social Security of $600.00 per month and, the $70,000.00 savings would continue to be available to the well spouse as her "nest egg." The husband elected to have his pension terminate upon husband's death and wife would not receive any of husband's pension benefits. Therefore, when the husband died, the wife's guaranteed monthly income would be $600.00, plus $175.00 interest earned upon the "nest egg," for total net monthly income of only $875.00 per month. This is far below the Minimum Monthly Maintenance Needs Allowance of $1,493.00, available to more "wealthy" widows and is hard to live on. Wife would need to access to and slowly spend down the $70,000.00 principal she is allowed to preserve, for the rest of her life to make ends meet. [The so called "Hurly" annuity calculation would actually come into play in this resource first example. The above summary is a more simplified calculation, but it would be close to the same end result. A "Hurly" annuity on 1/2 of the resources ($35,000) for a 70 year old community spouse would generate approximately $267/month annuitized income for the Wife for the remainder of her 15 year life expectancy]

"Income First": Proposed Policy: Under the proposed "Income First" rule, wife would be mandated to "spend down" one-half of the $70,000.00 in savings, requiring $35,000.00 to be spent. The wife would be able to preserve only $35,000.00 of the marital resources. In addition to the $300.00 Social Security income wife receives, the interest per month that wife could earn on the $35,000.00 would be $87.00 for combined guaranteed income of only $387.00. For as long as the institutionalized husband is in the nursing home, wife would be able to receive part of her husband's income to bring her Minimum Monthly Maintenance Needs Allowance up to $1,493 per month.

However, upon husband's death, wife would simply "take over" her husband's Social Security of $600.00 plus the $87.00 generated by the $35,000.00 in savings she was allowed to preserve (under "Income First" (one-half of the $70,000.00), $35,000.00 would have to be "spent down" on nursing home costs or otherwise. Under the above common fact situation, Wife would not receive her husband's pension. Wife's guaranteed monthly income would be $600.00 Social Security, plus $87.00 interest income or $687.00. Wife will then be forced to begin "drawing down," the $35,000.00 she is allowed to keep at a rapid pace, and will probably become impoverished before her natural life expectancy ends. Under the proposed "Income First" policy, Wife would have lost $35,000.00 of the "nest egg" she needed to live on for the rest of her life and would virtually be assured of becoming impoverished and in all probability would lose her home over the next 15 years or more of her life.

Why the current "Resource First" rule should be preserved: The "Resource First" method is kinder and gentler to low income/low asset community spouses and provides the Community Spouse the security of having a larger "nest egg." The change in the Regulation would have extreme impact on the well spouse's ability "to make ends meet."

Comments on the proposed policy not to protect an unmarried person's residence pending nursing home rehabilitation: DPW's proposed Regulations would not protect the residence of an unmarried elderly person if they are Medicaid eligible immediately upon admission to a nursing home:

For extremely low income and low asset individuals who own their own house, if a widowed client, "broke her hip," and required rehabilitation in a nursing home for 6 months, with the expectation of returning home, and the widowed client has virtually no cash resources and was living exclusively on her Social Security and/or pension income to make ends meet, under the proposed Regulations, none of the widow's Social Security monies could be used to preserve the residence, pay taxes or maintain heat in the house, which would require the residence to be sold. Thereafter, when the widowed client completed nursing home physical therapy, recovered, and was able to walk again, she would no longer have any place to live, and would, effectively have been "thrown out" of her house. The savings to the Commonwealth are minimal. The cost of the widow losing her home is devastating.

Sincerely,

PATTERSON & KIERSZ, P.C.

Gregory L. Kiersz

R. Thomas Murphy

GLK/RTM/kct
Enclosures
W:\XW\DOCS\Personal\Greg\lt Proposed Dept. of Welfare Regulations.doc

ORIGINAL: 2299

14-478-9

Dear Mr. Zogby,

I am writing to object to DPW's proposed rules eliminating the Non-Money Payment Spenddown program and to place limits on the Medically Needy Only Spenddown program. These proposed changes would have a devastating impact on low-income persons with disabilities, elderly persons, and working poor families who have no insurance or inadequate insurance and who need these programs to pay for needed health care.

I am also opposed to the Department's proposal to eliminate the Home Maintenance Deduction for MA recipients who are in a nursing facility for less than six months and who need the money to maintain their home.

Sincerely,

Name: Alice Cavolo

Signature: Alice Caldo

Address: 20 Meade Ave.
Pgh, PA 15202

Office of Income Maintenance
Bureau of Policy

OCT 24 2002

REFER TO: ~~[illegible]~~ FILE

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

Original; 2299

#14-478-26

UNIVERSITY of PENNSYLVANIA

□ Market Street Center
3823 Market Street
Philadelphia, PA 19104-3145
Tel: 215-746-6888
Fax: 215-746-6850

LIFE
Living Independently For Elders

☑ Woodland Avenue Center &
LIFE Administrative Offices
4101 Woodland Avenue
Philadelphia, PA 19104-4510
Tel: 215-573-7200
Fax: 215-573-4412

October 23, 2002

Office of Income Maintenance
Bureau of Policy

NOV 0 1 2002

Karole Aldridge

REFER TO: Willie
OLC
Homer
File

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

RE: Resource Provisions for Categorically NMP-MA and MNO-MA; Income Provisions for Categorically Needy NMP-MA and MNO-MA (55 PA CODE CHS. 178 AND 181)

Dear Mr. Zogby:

The purpose of this letter is to comment on the proposed rulemaking published in the Pennsylvania Bulleting on Saturday, October 5, 2002 (32 Pa.B. 4854). Our comments center on the elimination of the Home Maintenance Deduction. In addition, we support and endorse the Medical Assistance Advisory Committee's Long Term Care Delivery System Subcommittee's recommendation to the Department related to this proposal.

1. The Department has established goals to increase access to community-based long-term care and decrease the proportion of institutional long-term care. If implemented, this proposed rule would seriously undermine the Department's goals. Without the home maintenance deduction, low-income Pennsylvanians placed in nursing facilities will be unable to make rent or mortgage payments and would lose their homes. Once clinically and functionally able to return to the community, sadly there would be no community residence to return to.

2. According to the Department budget, the Department has proposed this change as a cost-containment initiative. However, any short-term savings in the current fiscal year will be more than offset by increased costs in future years as potentially time-limited nursing facility stays become permanent placements because of the loss of the community residence. At the October Medical Assistance Advisory Committee Long Term Care Delivery System Subcommittee meeting, Department staff reported that a thorough analysis of the proposed rule's fiscal impact has not been completed because needed data were not available.

3. We believe this rule would have a chilling effect on frail elders' willingness to choose community-based alternatives to nursing facility placement such as the Long Term Care Capitated Assistance Program (LTCCAP). An important factor in overcoming potential participants' natural reluctance to select an unfamiliar choice such as LTCCAP enrollment is the assurance that, in the unlikely event that a nursing home stay becomes unavoidable, the LTCCAP provider will make every effort to assist the elder to return home and fulfill the cherished wish to spend his or her remaining life in the community.

4. For some time the Department has sought to increase the availability of LTCCAP across Pennsylvania by enrolling more providers in LTCCAP. To date this goal has achieved limited success – participation in LTCCAP remains limited to the four original providers serving parts of Philadelphia and Allegheny counties. This change would further inhibit provider willingness to enroll in LTCCAP as it will threaten financial viability, as well as the ability of current providers to remain enrolled. Financial viability depends on the ability to contain utilization of certain high-cost services, notably nursing facility expense. A key component of the LTCCAP model is the ability to use time-limited nursing facility admission as a bridge back to community living following an acute episode.

5. Some have commented on the possibility that the deduction is being inappropriately applied in situations where there is no possibility for the individual to leave institutional care and return home; noting that this change would eliminate such fraudulent use. However, mechanisms to address Medical Assistance fraud and abuse are already in place and can be utilized to address any such fraud, thereby making this change unnecessary.

In sum, we believe that the proposed change will seriously undermine important public policy goals, fail to achieve cost savings, and is unnecessary to address possible fraud.

Thank you for the opportunity to comment on DPW's proposed rulemaking.

Sincerely,

Karen Buhler-Wilkerson, RN, PhD, FAAN
Professor of Community Health
Faculty Director, LIFE

Christine M. Allen

Christine M. Allen, LSW, ACSW, CHE
Executive Director, LIFE

Original : 2299

UNIVERSITY of PENNSYLVANIA

□ Market Street Center
3823 Market Street
Philadelphia, PA 19104-3145
Tel: 215-746-6888
Fax: 215-746-6850

LIFE

Living Independently For Elders

☑ Woodland Avenue Center &
LIFE Administrative Offices
4101 Woodland Avenue
Philadelphia, PA 19104-4510
Tel: 215-573-7200
Fax: 215-573-4442

NOV -6 PM 3: [illegible]
REVIEW COMMISSION

#14-478-34

Office of Income Maintenance
Bureau of Policy

NOV 04 2002

REFER TO: Karole Aldridge
Willie
OLC
Hoover
File

October 23, 2002

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

RE: Resource Provisions for Categorically NMP-MA and MNO-MA; Income Provisions for Categorically Needy NMP-MA and MNO-MA (55 PA CODE CHS. 178 AND 181)

Dear Mr. Zogby:

The purpose of this letter is to comment on the proposed rulemaking published in the Pennsylvania Bulleting on Saturday, October 5, 2002 (32 Pa.B. 4854). Our comments center on the elimination of the Home Maintenance Deduction. In addition, we support and endorse the Medical Assistance Advisory Committee's Long Term Care Delivery System Subcommittee's recommendation to the Department related to this proposal.

1. The Department has established goals to increase access to community-based long-term care and decrease the proportion of institutional long-term care. If implemented, this proposed rule would seriously undermine the Department's goals. Without the home maintenance deduction, low-income Pennsylvanians placed in nursing facilities will be unable to make rent or mortgage payments and would lose their homes. Once clinically and functionally able to return to the community, sadly there would be no community residence to return to.

2. According to the Department budget, the Department has proposed this change as a cost-containment initiative. However, any short-term savings in the current fiscal year will be more than offset by increased costs in future years as potentially time-limited nursing facility stays become permanent placements because of the loss of the community residence. At the October Medical Assistance Advisory Committee Long Term Care Delivery System Subcommittee meeting, Department staff reported that a thorough analysis of the proposed rule's fiscal impact has not been completed because needed data were not available.

3. We believe this rule would have a chilling effect on frail elders' willingness to choose community-based alternatives to nursing facility placement such as the Long Term Care Capitated Assistance Program (LTCCAP). An important factor in overcoming potential participants' natural reluctance to select an unfamiliar choice such as LTCCAP enrollment is the assurance that, in the unlikely event that a nursing home stay becomes unavoidable, the LTCCAP provider will make every effort to assist the elder to return home and fulfill the cherished wish to spend his or her remaining life in the community.

4. For some time the Department has sought to increase the availability of LTCCAP across Pennsylvania by enrolling more providers in LTCCAP. To date this goal has achieved limited success – participation in LTCCAP remains limited to the four original providers serving parts of Philadelphia and Allegheny counties. This change would further inhibit provider willingness to enroll in LTCCAP as it will threaten financial viability, as well as the ability of current providers to remain enrolled. Financial viability depends on the ability to contain utilization of certain high-cost services, notably nursing facility expense. A key component of the LTCCAP model is the ability to use time-limited nursing facility admission as a bridge back to community living following an acute episode.

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In sum, we believe that the proposed change will seriously undermine important public policy goals, fail to achieve cost savings, and is unnecessary to address possible fraud.

Thank you for the opportunity to comment on DPW's proposed rulemaking.

Sincerely,

Karen Buhler-Wilkerson, RN, PhD, FAAN
Professor of Community Health
Faculty Director, LIFE

Christine M. Allen

Christine M. Allen, LSW, ACSW, CHE
Executive Director, LIFE

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
UNION COUNTY ASSISTANCE OFFICE
1610 Industrial Blvd. Suite 300
Lewisburg, Pennsylvania 17837-1292

14-478-11

TELEPHONE NUMBER
AREA CODE (570)-524-2201
FAX NUMBER (570)-524-2361

October 22, 2002

Original: 2299

Edward J. Zogby, Director
Bureau of Policy
Office of Income Maintenance
Room 431, Health and Welfare Building
PO Box 2675
Harrisburg PA 17105-2675

Office of Income Maintenance
Bureau of Policy

OCT 24 2002

Willie

REFER TO: OGC Stonel

file

Dear Mr. Zogby:

These are comments from the Union County Board of Assistance on the proposed changes to NMP Spenddown and Long Term Care programs published in the October 5th issue of the Pennsylvania Bulletin.

The Board strongly objects to the elimination of the NMP Spenddown program. While Union County does not have many of these cases, they do represent the most needy of the County's Medical Assistance cases.

These NMP clients are people who are under age 65 with high pharmacy and other medical expenses. For example, our County has an NMP Spenddown client named Al who has excess income of $141 per month. Al is age 44 and wheelchair bound. Al spends his $141 excess at the beginning of each month on some of his prescriptions. He is then able to use his ACCESS card to pay for his Kidney Dialysis treatments. Al also uses his Access card to get transportation services from the County's MA transportation provider. There are no other programs that will cover all of Al's medical expenses.

The Board also objects to the removal of the Home Maintenance Deduction for patients who are temporarily in a Long Term Care Facility. While few cases in Union County are given this deduction, it is critical for those who do get it. Without this deduction most temporary LTC patients will not be able to maintain their residence. With no home to return to, their stay in the LTC will probably be extended while a new home is located. If extended, their stay would not be covered by Medicaid (not Medically eligible), thus adding to the burden of these patients with limited assets. The Board was also concerned about the mental anguish that could result from a patient not knowing if they will have any home to go to upon their release from the LCT. This could also create a financial burden for local Social Service Agencies.

We appreciate the opportunity to have our comments considered.

Sincerely,

Jm Prah

Joseph Prah, Executive Director for
Dr. Matthew Silberman, Chairman
Union County Board of Assistance

JP:wz

IRRC #2299
Department of Public Welfare
Title: Resources Provisions for Categorically NMP-MA and MNO-MA; Income Provisions for Categorically Needy NMP-MA and MNO-MA

(Form A)		
NAME	ADDRESS	DATE of CORRESPONDENCE
Annetta M. Heffer		10-09-02
Michael		10-09-02
Keisha Stein		10-09-02
Nancy K. Bush		10-09-02

ORIGINAL: 2299

October 9, 2002

Dept. of Public Welfare
Edward J. Zogby, Director
Bureau of Policy, Room 431
Health and Welfare Bldg.
Harrisburg, Pa 17120

RE: Proposed Regulations

Dear Mr. Zogby:

I am opposed to the proposed regulations to implement an income-first approach to determine the protected share retained by community spouses. It would be unfair to eradicate the protections that have been afforded low income spouses by the Hurley case. Spouses of nursing home residents sorely need the ability to retain enough income to reach the minimum income level established by Congress. This proposal must not be passed since it would unfairly impact the financial resources of our low income elderly married couples who need to have nursing home care.

Very truly yours,

Annetta M

Cc: Independent Regulatory Review Commission

David Sumner, Director of Policy, Fisher for Governor

Suzanne Itzko, Rendell for Governor

The Honorable Harold F. Mowery, Jr.

The Honorable Vincent Hughes

The Honorable George Kenney, Jr.

The Honorable Frank Oliver

Original. 2299

#14-478-7

Elder Law Firm of
Marshall & Associates

303 Allegheny Street • Jersey Shore, PA 17740 • (570) 398-7603
49 East Fourth Street • Williamsport, PA 17701 • (570) 321-9008
Cross Creek Pointe • 1065 Highway 315 • Wilkes-Barre, PA 18702 • (570) 822-6919

www.paelderlaw.com
(800) 401-4552

Office of Income Maintenance
Bureau of Policy

OCT 16 2002

REFER TO: Willie
OLC
Hoover
File

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

Dear Mr. Zogby:

RE: Request for detailed Regulatory Analysis Forms
Proposed Rulemakings appearing at
32 Pa.B 4584 and 32 Pa.B 4560

I am considering commenting on the Department's Proposed Rulemakings which are set forth in the above referenced pages of the Pennsylvania Bulletin. These Rulemakings include, among other matters, a proposed change to an income first methodology in the determination of the resource allowance of low income community spouses.

This letter is my formal request that you provide me with the detailed Regulatory Analysis Forms that relate the referenced Rulemakings. The Forms may be mailed to me as follows:

Jeffrey A. Marshall
Attorney at Law
49 East Fourth Street, Suite 200
Williamsport, PA 17701

Thank you.

Respectfully,

MARSHALL & ASSOCIATES

Jeffrey A Marshall

Jeffrey A. Marshall, JD, CELA*

* Certified as an Elder Law Attorney by the National Elder Law Foundation

IRRC #2299
Department of Public Welfare
Title: Resources Provisions for Categorically NMP-MA and MNO-MA; Income Provisions for Categorically Needy NMP-MA and MNO-MA

(Agency Form B)		
NAME	ADDRESS	DATE of CORRESPONDENCE
Annetta Heffer		**10/09/02**
Nancy K. Busch		**10/09/02**
Michael Kell		**10/09/02**
Kristine Stein		**10/09/02**

Original: 2299

14-478-2

SAUERS CONSULTATIONS & SERVICES

Bucks Co. Office Center #834
1200 New Rodgers Rd.
Bristol, PA 19007

Phone 215-781-3985
Fax 215-781-3989

Bureau of Policy
OCT 15 2002
REFER TO: Willie
OLC
Hoover
File

October 10, 2002

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

RE: Proposed rule changes in regards to Resource Provisions for
Nursing Home Medical Assistance applicants
(PA Bulletin - Volume 32, number 40 issued 10/15/02)

Dear Mr. Zogby:

After reviewing the proposed changes for LTC services under the MA program, I believe there are situations you did not visualize when making these changes. I realize the money problem The Commonwealth may have, but if some changes are made to your proposed policy, it will reduce costs and at the same time project certain community spouses from becoming insolvent . My proposals are listed below:

1. The community spouses that will be affected the most severely are women. Usually their income is much lower than that of their institutionalized spouse (IS). Basically, by implementing the "income first rule", you have virtually eliminated the appeal option of protecting more resources than their usual 1/2 of combined resources. Unfortunately, the pensions and social security income of the IS usually die with them or, in some instances, the CS is only entitled to a portion of their pension when the IS expires. The requirements of the Medicare Catastrophic Coverage Act were designed to ensure that the CS has sufficient income to meet basic monthly needs. I would suggest that the only "income-first" income that would be counted would be the guaranteed income amount the CS will receive when her IS passes away. The same rule would apply to S.S. benefits. This method would ensure that the "income-first" rule is real income that will not disappear after the demise of her spouse. If there is still an income shortage, then as much unprotected resources as needed be allowed in order to provide income under the "annuity" rule to meet her MMMNA. This would certainly reduce costs, allow the implementation of the "income-first" regulation and most of all, make sure that one of our most vulnerable citizens, the female CS, have enough income to meet her basic needs and protect her dignity.

2. If my first suggestion is not implemented, at least allow the Community Spouse the maximum amount of resources be protected. That figure presently is $89,280.00. At least this change would soften the impact of your proposed "income-first" rule.

3. In regards to your proposed amendment on penalty periods, it appears there is no longer any minimum amount on a transfer of assets without fair consideration. This could be interpreted to mean that a $50.00 Christmas gift to a grandchild be counted as an illegal transfer of assets. I would strongly suggest that proper training be given to your eligibility technicians in determining what does and does not meet the criteria for illegal transfer of assets. It must be kept foremost in mind that penalty periods are given for people who transfer assets with the intent of qualifying for MA and for no other reason.

If you have any questions concerning my comments, please contact me. I would be glad to appear in person to give testimony in these matters.

Sincerely yours,

Eugene J Sauers

Eugene J. Sauers
Sauers Consultations &
Services for the Elderly

rs

Original: 2299

14-478-2

SAUERS CONSULTATIONS & SERVICES

[illegible] 8:37

Bucks Co. Office Center #834
1200 New Rodgers Rd.
Bristol, PA 19007

Phone 215-781-3985
Fax 215-781-3989

[illegible] Bureau of Policy

OCT 15 2002

REFER TO: Willie

OLC
Hoover
File

October 10, 2002

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

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Nursing Home Medical Assistance applicants
(PA Bulletin - Volume 32, number 40 issued 10/15/02)

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Sincerely yours,

Eugene J Sauers

Eugene J. Sauers
Sauers Consultations &
Services for the Elderly

rs

14-478-8

Office of Income Maintenance
Bureau of Policy

OCT 2 1 2002

REFER TO: Willie
OLC
Jones
File

ORIGINAL: 2299

EDWARD P. CAREY
ATTORNEY AT LAW
SUITE 1460 THREE GATEWAY CENTER
PITTSBURGH, PA 15222
(412) 391-7445 **FAX (412) 391-7461** **email: epcarey@sgi.net**

October 10, 2002

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

Dear Commission:

The Department of Public Welfare published proposed regulations in the Pennsylvania Bulletin on October 5, 2002. If adopted one of these regulations would eliminate the *Hurly* protections. Currently a community spouse who has low income or high shelter costs or both may protect more that half of the combined assets of both spouses. In cases where there are insufficient assets to protect the community spouse, The Department will allow the community spouse to keep some or all of the institutional spouse's income.

The proposed regulations would require that the community spouse be allotted income from the institutional spouse and then, only if he/she still had insufficient income to live on, would the Department allow him/her to keep more than half of the assets.

This regulation would increase the period of spend down before the institutional spouse could apply for Medicaid and thus decrease the amount that the Department would have to pay for the care given to the institutional spouse in the nursing home. This fiscal saving for the Department would come at the expense of the most vulnerable members of our society.

In most cases the community spouse is female. Female senior citizens frequently receive a small social security check and have no pension and no IRA. Allotting these women income from their husbands seems fair. However what happens after the husband dies? Instead of two social security checks there is now only one. In many cases the pension also ends; at best it has now been cut in half. For the remainder of her life the widow must survive on a greatly reduced income. I do not think that the savings for the Department of Public Welfare are worth the suffering these regulations will force on so many of our seniors.

I am a senior citizen myself, but I have Long Term Insurance. So does my wife. But most of the clients who consult me on Medicaid issues do not. On their behalf, I request that you do not allow The Department of Public Welfare to adopt the "The Income First Regulations."

Sincerely,

Edward P. Carey

cc: Edward J. Zogby, Department of Public Welfare

Original: 2299

14-478-3

October 9, 2002

Dept. of Public Welfare
Edward J. Zogby, Director
Bureau of Policy, Room 431
Health and Welfare Bldg.
Harrisburg, Pa 17120

RE: Proposed Regulations

Dear Mr. Zogby:

I am opposed to the proposed regulations to implement an income-first approach to determine the protected share retained by community spouses. It would be unfair to eradicate the protections that have been afforded low income spouses by the Hurley case. Spouses of nursing home residents sorely need the ability to retain enough income to reach the minimum income level established by Congress. This proposal must not be passed since it would unfairly impact the financial resources of our low income elderly married couples who need to have nursing home care.

Very truly yours,

Annetta M

Cc: Independent Regulatory Review Commission

David Sumner, Director of Policy, Fisher for Governor

Suzanne Itzko, Rendell for Governor

The Honorable Harold F. Mowery, Jr.

The Honorable Vincent Hughes

The Honorable George Kenney, Jr.

The Honorable Frank Oliver

Office of Income Maintenance
Bureau of Policy

OCT 15 2002

REFER TO: Willie
OLC
Hones
File

ORIGINAL: 2299

October 9, 2002

Dept. of Public Welfare
Edward J. Zogby, Director
Bureau of Policy, Room 431
Health and Welfare Bldg.
Harrisburg, Pa 17120

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Very truly yours,

Annetta M. Heffer

Cc: Independent Regulatory Review Commission

David Sumner, Director of Policy, Fisher for Governor

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