# 14-478-43

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Office of Income Maintenance
Bureau of Policy

NOV 04 2002

REFER TO: Kayle Aldridge
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Hoover
File

November 4, 2002

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

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

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

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

By way of illustration, assume Mr. and Mrs. Smith, each 75 years old, have resources consisting of $60,000 in a jointly owned savings/checking account. Further, assume that Mr. Smith's income consists of $1000 in Social Security and Mrs. Smith's income consists of $418 in Social Security. If Mr. Smith enters a nursing home and becomes the Institutionalized spouse (IS), Mrs. Smith as the community spouse (CS) is entitled to 2 spousal benefits - a resource allowance (CSRA) and a minimum monthly maintenance needs allowance (MMMNA).

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

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

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

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

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

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

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

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

Accordingly, I am urging you to withdraw the Department of Public Welfare proposal which recommends the change from a "resource-first" approach to an "income-first" approach in providing for the minimum monthly maintenance needs allowance of a community spouse.

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

Sincerely,

John J. McGee

JJM:lag

attachments

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

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

Ms. Johnson also explained the process the Department uses in determining an allowance for the needs of a community spouse. Current regulations allow for a "Minimum Community Spouse Maintenance Allowance" of $1,452.00 and a "Maximum Community Spouse Maintenance Allowance" of $2,232.00 per month. Ms. Johnson explained that a calculation is made based on the incomes of both spouses and the household expenses of the community spouse. If the ensuing calculation results in an amount of less than the "Minimum Community Spouse Maintenance Allowance", an appeal may be filed by the community spouse to secure a larger "protected" share of resources to bring the community spouse's income up to the "Minimum Community Spouse Maintenance Allowance" of $1,452. Appealing the resources assessment is commonly referred to as a "Hurly Amendment appeal." If appealed, and if the subsequent ruling is in favor of the plaintiff, the community spouse would be allowed to keep an additional portion of the combined assets of both spouses, which, if invested in an income-producing annuity, would provide the additional income needed for the community spouse to meet their needs. Under the proposed cost containment regulations, the Department will return to "pre-Hurly" status when determining the amount of protected resources allowed for the community spouse. In effect, the resources determined to belong to the institutionalized spouse by the original resource assessment, must be used for private pay until the resources are reduced to the MA/LTC eligibility limit. By returning to a pre-Hurly status it is expected that it will result in a cost savings to the Department by extending the time that an institutional spouse remains private pay. The tentative plan calls for proposed rulemaking this summer with final rulemaking and implementation of regulations anticipated for January 2003.

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

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

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

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

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

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

*Proposed Rulemaking*

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

*Partial Month of Ineligibility*

*Background*

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

*Proposed Amendment*

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

*Limit on Unpaid Medical Expenses*

*Background*

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

*Proposed Amendment*

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

*Elimination of the Home Maintenance Deductio*

*Background*

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

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

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

**Efficiency/Productivity:**

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

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

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

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

**Consideration of Alternatives :**

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

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

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

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

**Spillover Effects:**

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

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

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

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

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TELECOMMUNICATIONS MESSAGE

DATE: JUNE 10, 2002 TIME: 4:46 P.M.

ATTENTION: THE HONORABLE GOVERNOR MARK SCHWEIKER

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TELECOMMUNICATIONS MESSAGE

DATE: June 10, 2002 TIME: 4:55 pm

ATTENTION: The Honorable Feather O. Houstoun

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TELECOPY NUMBER: (717) 772-2062

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JOHN J. MCGEE
ATTORNEY AT LAW

June 10, 2002

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

Dear Mr. Newitt,

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

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

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

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

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

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

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

If community spouses are forced to purchase commercial annuities in order to protect the resources of the institutionalized spouse, it is very likely that the Department of Public Welfare will expend more funds on long-term care than it presently does in situations where the community spouse predeceases the institutionalized spouse. For example, if Mrs. Smith is able to retain fully the $60,000 owned by her and her spouse under the "resource-first" approach, she will probably receive advice to exclude her husband as beneficiary of her Will in an effort to bequeath everything to her children. At the death of the community spouse, the Department of Public Welfare insists that the institutionalized spouse elect his $\frac{1}{3}$ statutory share as a surviving spouse to give him $20,000 which renders him ineligible for Medical Assistance. If Mrs. Smith however purchases a commercial annuity with the funds available for the institutionalized spouse and Mr. Smith consents or joins in that purchase, the spousal election does not apply because of a specific provision in the law. Thus, someone who under the current "resource-first" approach is not pre-disposed to purchasing a commercial annuity will do so in order to protect the funds and might thereby preclude the Department of Public Welfare from successfully asserting the spousal election.

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

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

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

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

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

Accordingly, I am asking you to

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

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

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

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

Sincerely,

John J. McGee

JJM:dmm

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

The Honorable Governor Mark Schweiker

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

attachments (4)

JOHN J. MCGEE
ATTORNEY AT LAW

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TELECOMMUNICATIONS MESSAGE

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

ATTENTION: EDWARD J. ZOGBY
DEPARTMENT OF PUBLIC WELFARE

COMPANY: COMMONWEALTH OF PENNSYLVANIA

TELECOPY NUMBER: (717) 787-6765

FROM: JOHN J. McGEE

NUMBER OF PAGES (including cover sheet): 22

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

THANK YOU.
*********************************************************************

RECEIVED TIME NOV. 4. 3:45PM PRINT TIME NOV. 4. 4:01PM

ORIGINAL: 2299

# DISABILITIES LAW PROJECT

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**Respond To: Philadelphia**

**www.dlp-pa.org**

November 4, 2002

***By Facsimile Transmission and First Class Mail***

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

**Re: Proposed Regulations to Eliminate the Home Maintenance Deduction**

Dear Mr. Zogby:

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

DPW's proposal to eliminate the Home Maintenance Deduction is not just likely to result in long term, costly institutionalizations for persons who could return home after a brief period of rehabilitation services, but is actually *designed* to do so. Currently, DPW allows a person whose treating physician has certified that they are likely to return home in six months or less after being admitted to a rehabilitation or nursing facility, to set aside an extremely modest amount of income toward making sure they have a home to return to when their need for nursing home or rehabilitation services has ended. Without the ability to spend this money to pay rent, mortgages, upkeep or taxes, most persons temporarily in need of nursing home care or other short term rehabilitation services will without doubt lose the homes to which they could return.

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

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

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

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

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

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

Sincerely yours,

Lisa M. Day
Attorney at Law

cc: IRRC

DISABILITIES LAW PROJECT
THE PHILADELPHIA BUILDING
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# facsimile TRANSMITTAL

To: IRRC Fax #: 717 783-2664

To: Fax #:

To: Fax #:

From: Lisa M. Day Subject: Comments

Date: 11-4-2002 No. of pages(including cover sheet): 4

Comments:

IF YOU DO NOT RECEIVE ALL OF THE PAGES, PLEASE CALL US AT 215-238-8070.

CONFIDENTIALITY NOTICE: The documents and information contained in this fax transmission contain confidential and/or otherwise legally privileged information from the Disabilities Law Project. The documents and information contained in this fax transmission are intended only for the use of the recipient(s) named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or taking action in reliance on the contents of this transmission is prohibited, and you are requested to return this transmission to the address set forth above immediately. If you have received this transmission in error, please notify the Disabilities Law Project at the address and phone number set forth above. DLP will arrange for the return of these documents at no cost to you.

Comments on the Resource provisions for categorically needy NMP-MA and MNO-MA; income provisions for categorically needy NMP-MA and MNO-MA

The home maintenance allowance preserves some of the consumer's income during what is considered a short term stay in a nursing home. That portion of income is not used for nursing home costs. Currently the consumer, with the recommendation of the physician can use a portion of their income to pay bills at home for 6 months, e.g., rent/mortgage, utility bills etc. This helps consumers have a home to which to return on discharge. If this allowance is taken away, consumers are at risk of losing their home and it will make discharge from nursing homes a very difficult thing. Pennsylvania has stated that it wants to change the fact that it is a State biased toward institutionalization and instead favor home and community based care, dissolving this allowance flies in the face of that intent. Consumers who need a short term stay in a nursing home for rehabilitation or recovery will be at risk of permanent placement as their community residence will be gone.

Comments on the proposed regulations on Personal care homes

We are all for increased education and training for staff and administrators in PCHs but is mindful of how this will impact small, often very good, PCHs. The requirement should be done in a thoughtful way that will not harm the existence of good homes. It seems excessive to ask that all PCH administrators be college educated, however, mandatory competency testing on certain issues, including mental health, is a vast step forward. There is however, no mention of how this would be monitored, nor is there much about monitoring in the whole document. It appears far too easy for a current PCH to open a secured dementia unit - all the PCH appears to need is comply with the regulations that are in effect now regarding secured facilities. We feel there should be some kind of screening prior to a blanket okay. We continue to agree with the requirement about passing medications and the hold on alternatives until DPW can make passing medication safer, which may include staff certification. We agree with the proposal that consumers will be assessed within 72 hours of admission for appropriate level of care. It is unclear how this will be done but seems a step in the right direction.

Original: 2299

#14-478-44

# Interoffice Memo

**Date:** 11/4/2002

**To:** To whom it may concern

**From:** Darlene Burlazzi, Deputy Administrator Allegheny County Area Agency on Aging

**RE:** Comments

Please accept our faxed comments (attached) to proposed regulations on 'Resource Provisions for categorically needy NMP-MA and MNO-MA; income provision for categorically needy NMP-MA and MNO-MA' and 'Personal Care Homes'.

Office of Income Maintenance
Bureau of Policy

NOV 04 2002

REFER TO: Karole Aldridge
Willis
OLC
Homes
File

# ALLEGHENY COUNTY DEPARTMENT OF HUMAN SERVICES

Marc Cherna, Director

Mildred E. Morrison, Administrator
Area Agency on Aging
441 Smithfield Street, Second Floor
Pittsburgh, PA 15222-2219

Ph.: 412-350-4234
Fax: 412-350-4330
TDD: 412-350-2727
Toll Free: 1-800-344-4319

# FAX

**DATE** 11/04/2002

**PLEASE DELIVER THE FOLLOWING MESSAGE TO:**

**NAME** ______

**DEPARTMENT** ______

**FAX NUMBER** 717 787-6765

**FROM** DARLENE BURLAZZI, DEPUTY ADMINISTRATOR, ALLEGHENY COUNTY AREA AGENCY ON AGING

**MESSAGE** COMMENTS TO PROPOSED REGULATIONS ON "RESOURCE PROVISIONS FOR CATEGORICALLY NEEDY NMP-MA AND MNO-MA AND PERSONAL CARE HOMES

**WE ARE SENDING** 2 **PAGES (INCLUDING THIS PAGE)**

**TO SEND US A FAX, DIAL 412-350-3193 / 350-4330**
**TO CALL US DIAL 412-350-4234**

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SCALES ELDER LAW The Elder Law Office of **KEMP SCALES**

MEMBER
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November 1, 2002

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

Re: Proposed Rulemaking changes to Medical Assistance regulations

Dear Mr. Zogby:

I am writing to you regarding the Proposed Rulemaking changes by your office to Pennsylvania's Medical Assistance eligibility requirements, as published in the *Pennsylvania Bulletin* on October 4, 2002. I am particularly concerned about the first proposed revision, to change the Medical Assistance eligibility rule for the spouse of someone in a nursing home from the current "resource-first" approach to an "income-first" approach. Because of my work as an elder law attorney, helping Pennsylvania seniors find ways to pay for the economically devastating costs of nursing home care, I am personally acquainted with the serious effect this proposed change in the law to an "income-first" approach will have on many seniors.[1]

Certainly finding ways to save the state money when the state budget is facing a serious deficit is vitally important. But what is particularly troubling to me is that the people who will be directly affected by this change are one of the most vulnerable groups in our state, elderly widows and widowers living on limited income, with limited resources, who had a spouse in a nursing home. Is this really the group your office should be targeting? After all, the very downturn in the economy that has created this budget crisis for Pennsylvania and other states has also created a crisis for this already vulnerable group, who in many cases have seen their retirement savings shrink dramatically

[1] As an example of the "economically devastating" cost of nursing home care, the one nursing home in my home town of Titusville, Pennsylvania (population under 7,000) costs $65,000 a year, and that's just for room and board – prescription drugs and physical therapy can add another $5,000 to $10,000 a year. Very few of the seniors I work with have anywhere near enough savings to afford that kind of expense.

in the past year through a falling stock market or the bankruptcy of businesses such as Agway which held part of their modest savings.

The current "resource-first" approach available in Pennsylvania for an elder with income below a certain minimum level living at home (the "community spouse") who has a spouse in a nursing home (the "institutionalized spouse") is to have additional resources of the institutionalized spouse transferred to the community spouse. The amount of resources that may be transferred depends upon the income of the community spouse. The federal Medicaid law guarantees a current minimum monthly income to the community spouse of at least $1,452. But many of my clients who have a spouse in a nursing home have monthly incomes well below this figure. This is particularly true of elderly women, whose sole income is often their meager Social Security retirement check.[2] If her income is $600 per month, she can get enough of her husband's resources transferred to her (rather than spent on his nursing home care) to generate the additional $852 a month of income needed to meet her minimum needs.

Now it's true that the proposed change to an "income-first" approach would still permit her to get $1,452 per month by having $852 per month of her husband's income transferred to her.[3] So as long as her husband is alive, she is no worse off than under the "resource-first" approach. But, and here's the catch, once her husband dies, she will only be entitled to one Social Security income check, not two. And so her income will drop immediately. And substantially. Because by definition it is only elders on limited incomes – that is, incomes less than the minimum level guaranteed by the Medicaid law – that are concerned about this whole procedure in the first place, and the loss of even a few hundred dollars a month for such folks will necessarily be "substantial."

On the other hand, if Pennsylvania continues with its current "resource-first" approach, this elderly woman would be in much better shape financially after her husband died than under the "income-first" approach. When her husband first applied for Medicaid, rather than take $852 of his income, she could have instead chosen to keep more of their resources – enough more to permit her to purchase an immediate annuity that could generate the $852 per month of additional income. The significant difference here is that these additional resources, unlike the income, will not disappear when her husband dies. At the very time when she is dealing with the loss of her husband, she will not also be faced with the loss of income for the rest of her life.

[2] In my experience, older women with spouses in a nursing home have often worked at home most of their lives and have very limited Social Security income and so are particularly dependent on their husband's Social Security and pension to make ends meet.

[3] This approach may prove unworkable in practice in many cases, as the income of the spouse in the nursing home is often largely (and sometimes solely) his monthly Social Security check. A recent case in the Second Circuit, *Robbins vs. DeBuono*, 281 F.3d 197 (2d Cir. 2000), held that requiring an institutionalized spouse to transfer his Social Security income to his community spouse would be in violation of federal law.

That's my concern, that this proposed change targets elderly widows and widowers who had a spouse in a nursing home, a particularly vulnerable group of our citizens and hardly the first people who come to mind as being the ones who shoulder the burden of the State's budgetary crisis.

Will the cost savings from this proposed change be so significant that they outweigh the foreseeable adverse impact on these elders? The DPW's estimate of the "projected annualized savings" from the change is $47,222 million. That sounds like a lot. But, first of all, less than half of it – $21,396 million – is the projected savings "in State funds." In other words, about 55% of the savings are being passed along to the federal government. Second, the Proposed Rulemaking does not mention the issue addressed recently by the Second Circuit in *Robbins vs. DeBuono,* referred to above, which held that to compel a spouse in a nursing home to transfer his Social Security income to his community spouse would violate the federal anti-alienation provisions of the Social Security Act. With the Social Security income of the nursing home spouse "off the table" – and, in my experience, Social Security retirement usually accounts for most, if not all, of the income of this spouse – how much would the projected savings to the state of this "income-first" approach really be? And finally, won't the restriction imposed by the switch to an "income-first" approach simply create a stronger incentive for seniors (at least seniors who consult with elder law attorneys) to use other available means of protecting their spouses and their life savings – such as purchasing annuities directly, or having the community spouse simply refuse to turn over excess resources to her husband in the nursing home? After all, both of these options are expressly recognized by the federal Medicaid law, but to date have not been widely used in Pennsylvania precisely because of its "resource-first" policy. Given the above, the projected cost savings of the switch to "income-first" may turn out to be very meager indeed.

Thank you for the opportunity to express my concerns about this proposed change in your current Medical Assistance regulations.

Very truly yours,

Kemp C. Scales

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
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✓ Richard Sandusky
Independent Regulatory Review Commission
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Harrisburg, PA 17101

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JOHN P. GREGG
NANCY NEFF SOLNICK
KENNETH R. MYERS

November 1, 2002

**Forwarded via Federal Express/Monday Delivery**
Edward J. Zogby, Director
Bureau of Policy, Room 431
Health and Welfare Building
Harrisburg, PA 17120

Re: Proposed Rulemaking
55 PA Code, 178 and 181
"Income First Rule"

Dear Mr. Zogby:

I am writing to express my dismay and concern regarding the proposed changes to 55 PA Code 178 and 181 that would enact the "Income First Rule". The Medicare Catastrophic Coverage Act of 1988 included provisions that protect the spouse living at home (Community Spouse) from having her resources depleted when the other spouse (Institutionalized Spouse) is admitted to a long term care facility. The requirements of MCCA were designed to ensure that the Community Spouse would not be impoverished by the cost of the Institutionalized Spouse care.

First: This proposed rule making does not conform to the intentions of the General Assembly in the enactment of the statute on which the regulation is based. The statute is designed to protect and provide services for Pennsylvanian's most vulnerable citizens. This proposed rule making is inconsistent with that intent. The proposed regulations would do great harm to thousands of seniors in Pennsylvania who can least afford it.

Second: By requiring the Community Spouse to receive income first and eliminating the annuity rule, the Community Spouse will be even more impoverished if the Institutionalized Spouse dies. This will require the Commonwealth to provide additional services and benefits through other Welfare programs and will negate the savings of this proposed rule making. Under Hurly these elderly spouses are permitted to keep additional assets so that they can support themselves after the death of the Institutionalized Spouse.

One measure of a civilized society is how we treat our older citizens. The proposed rule making will change financial arrangements in determining eligibility for nursing home benefits for older married citizens and would undermine our claim as a civilized and compassionate Commonwealth.

As an elder law attorney, I have counseled hundreds of elderly citizens. There is great panic and fear when elderly people find their spouse is about to be confined to a nursing home permanently and they realize the financial devastation it will cause. It has been rewarding to advise them that their Commonwealth made provisions that may enable them to remain self-sufficient even after the death of their spouse. Why are we trying to balance the budget on the backs of these elderly, vulnerable people? Any consideration you can give in not enacting these new rules will be greatly appreciated.

Very truly yours,

Lois A. Nafziger

LAN/cpk

cc: Independent Regulatory Review Commission via Federal Express/Monday delivery
The Honorable Harold F. Mowery, Jr.
The Honorable Dennis M. O'Brien
David Sumner, Director of Policy, Fisher for Governor
Suzanne Itzko, Rendell for Governor

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Original: 2299

ROBERT CLOFINE ATTORNEY AT LAW

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#14-478-33

**VIA FEDERAL EXPRESS**

Office of Income Maintenance
Bureau of Policy

NOV 04 2002

REFER TO: Karole aldridge ~~Willie~~
OLC
Hoover
File

November 1, 2002

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

Re: Comments Regarding Proposed Rulemaking
55 Pa. Code Chapters 178 and 181
32 Pa. Bulletin 4854
Regulation #14-478

Dear Mr. Zogby:

I am an estate and elder law attorney practicing in York County. As such, I have a keen interest in how these proposed regulations will impact my clients and the elderly population of Pennsylvania as a whole. The proposed rulemaking would make four significant changes. I write today to express my concerns about two of the changes.

## I. THE INCOME-FIRST RULE—SECTIONS 178.2 and 178.124(b)(2)

### A. The Regulation Is Not Consistent With The Intent Of The General Assembly

The Department of Public Welfare (the "Department") cites sections 201(2), 403(b), 441.1 and 442.1 of the Public Welfare Code as the authority for the promulgation of these regulations. While those sections may give the Department the authority to promulgate the regulations, it cannot be said that these proposals are consistent with the intent of the General Assembly in the enactment of those sections of the Public Welfare Code. The Public Welfare Code was enacted in 1967. The federal statute giving rise the "income-first vs. resource-first" issue was not enacted until 1988. As such, there is no way to glean the intent of the General Assembly on this specific issue. We do know, however, that Pennsylvania has implemented a "resource-first" approach since 1996. We also know that the General Assembly has not acted to change that rule. Therefore, it can be assumed that the General Assembly is in favor continuing a "resource-first" methodology.

As further evidence of the General Assembly's view on this issue, I direct your attention to current House Bill No. 2829 which would maintain the current "resource-first" approach.

### B. The Regulation Will Not Achieve the Intended Fiscal Impact

As noted, the General Assembly has not voiced its opinion on this issue. The Department is simply reacting to the Supreme Court's decision in *Wisc. Dep't of Health and Family Services v. Blumer*, 534 U.S. 473 (2002) and its desire to cut program costs. Unfortunately, the projected cost savings are illusory.

In the preamble to the proposed regulations, the Department states that it currently "uses an "annuity rule" which permits the couple to use resources to purchase an annuity that will provide the community spouse with the additional income that she is permitted." That is not an accurate characterization of the current "resource-first" approach. Under the current rule, the community spouse can retain resources sufficient to purchase a commercial annuity that would pay her the additional income. That is, she is not required to actually purchase an annuity. Rather, she is permitted to retain additional resources that would be required to purchase such an annuity. This distinction is significant, as the proposed regulations do not prevent the community spouse from purchasing an annuity to provide the income she is permitted. As such, despite the Department's claims to the contrary, this proposed initiative will not require the spouse in the nursing facility to use more of his resources to pay for the cost of his nursing facility care. As a result, the Department will not achieve the projected savings. This is illustrated by the following example.

Assume that under §181.452(d)(2), the community spouse would be entitled to an income allowance from the institutionalized spouse of $400 per month. Because of this income need, the current "resource-first" rule entitles the community spouse to increase community spouse resource allowance under §178.124(b)(2). Based on the settlement agreement in the *Hurly* case, the amount of that increase is equal to the cost of "an unguaranteed single lifetime commercial annuity" that will pay the community spouse $400 per month. Assume that the cost of such an annuity would be $50,000. If the proposed regulation is adopted, the community spouse will not be entitled to protect the additional $50,000 in resources under §178.124(b)(2). However, she will still be able to use the $50,000 to actually purchase an annuity that will pay her the $400 per month for the rest of her life.[1] Therefore, the switch to an "income-first" rule will not require the

[1] In certain circumstances, the Department has claimed that the purchase of an annuity by the community spouse was a transfer for less than fair consideration under §178.104. The Department was unsuccessful in *Mertz v. Houston*, 155 F. Supp. 2d 415 (E.D. Pa. 2001), but was successful in *Dempsey v. Department of Public Welfare*, 756 A.2d 90 (Pa.Cmwlth. 2000). In both cases, however, the purchase of the annuity caused the community spouse's income to exceed the minimum monthly maintenance needs allowance (this is commonly referred to as the "MMMNA", but is called the "CSMMNA" in the proposed regulations). In the example I have postulated, the purchase of the annuity would only cause the community spouse's income to equal (and not exceed) the CSMMNA. If it is the Department's position that the proposed regulations would somehow prevent the community spouse from purchasing annuity that would cause her total income to equal but not exceed the CSMMNA, then the regulations should set forth such a rule. Such a rule would not comport with federal law, however. See *Mertz, supra*.

couple to spend the $50,000 on nursing home care, and the Commonwealth will not achieve the projected savings.

In the end, the only impact of the "income-first" rule is that the community spouse will be forced to purchase an annuity in order to protect the additional resources. Since the annuity is irrevocable, this serves only to restrict the community spouse's financial flexibility, with no offsetting benefit to the Commonwealth.

C. The Regulation Lacks Clarity and Conflicts with Other Regulations and Statutes

I might be able to end my comments on this issue without further statement. I doubt that any person who was unfamiliar with the nursing home medical assistance program could apply the regulation as written. These regulations will most certainly present a challenge for the Committees and the analysts at the IRRC.

1. The proposed changes to §§178.2 and 178.124(b) conflict with the current regulations at §181.452(d)(2). It would not make sense to adopt the proposed regulation without making conforming changes to §181.452(d)(2).

2. The proposed regulation introduces new terms and definitions at §178.2. Those include CSMMNA, MAMMNA, MIMMNA, and MMNA. These definitions are not needed in order to implement the change to an "income-first" rule. It would be preferable to simply adopt a regulation that re-states the federal law at 42 U.S.C. §1396r-5(d)(4). Alternatively, the regulation should use terms which are identical to those used in the federal statute. If the Department insists on the using terms that have no counterpart in the federal statute, the following clarifications and corrections would be desirable:

(a) To make the definitions of MAMMNA and MIMMNA somewhat meaningful, the regulations should mention the current dollar amounts and then make reference to the fact that such amounts are adjusted annually. The Department has done this in other regulations. See, *e.g.*, §501.7(a)(2), (3) and (4).

(b) References in the definitions to the federal statutes should be consistent. For example, the definition of MAMMNA refers to the Social Security Act and provides a citation to the United States Code [the citation is incorrect; the correct cite is 42 U.S.C. §1396r-5(d)(3)(C)]. The definition of MIMMNA mentions a section of the Social Security Act, but fails to mention the act or provide a citation to the United States Code.

(c) The definitions of MAMMNA and MIMMNA should simply refer to the amounts established pursuant to 42 U.S.C. §1396r-5(d)(3)(C) and 42 U.S.C. §1396r-5(d)(3)(A) and (B), respectively. The Department has already done this at §181.452(d)(2)(ii) and (iv). The introductory phrase in the defintion of MAMMNA and MIMMNA is unnecessary and confusing. Particularly objectionable is the inference in the definition of MAMMNA that there is a limit on the amount of income that a community spouse is entitled to protect. Under the federal law, it is clear that the community spouse is entitled to protect all of her or his income regardless of amount. See 42 U.S.C. §1396r-5(b)(1). Therefore, the definition of MAMMNA should simply refer to the amount established pursuant to 42 U.S.C. §1396r-5(d)(3)(C) without including the introductory phrase that states "[t]he maximum amount of income permitted to be protected to prevent the community spouse from being impoverished…".

3. The term "monthly shelter expense" at §178.2 lacks clarity. This new definition essentially restates the current regulation at §181.452(d)(2)(ii) and (iii). The following clarifications and corrections would be desirable:

(a) Property taxes in Pennsylvania can be paid at rebate amount, face amount or penalty amount. The Department should state whether "property taxes" is the rebate amount, face amount or the amount actually paid by the community spouse. The Department's current interpretation of this issue under §181.452(d)(2)(iii) is unclear. The regulation should also state that the term "mortgage payment" includes a "home-equity" mortgage as well as a "purchase-money mortgage". The Department's current interpretation of this issue under §181.452(d)(2)(iii) impermissibly excludes "home-equity" type mortgages from qualifying as a mortgage payment.

(b) Under the proposed definition of "monthly shelter expense" the maintenance charge for a condominium or cooperative would be reduced by the utility allowance. This conflicts with federal law at 42 U.S.C. §1396r-5(d)(4) and the current regulation at §181.452(d)(2)(iii). As set forth in §181.452(d)(2)(iii), monthly shelter expenses include the maintenance charge for a condominium or cooperative and one of the utility allowances, provided that the maintenance charge for a condominium or cooperative does not include all of the utilities. The proposed definition should be revised to be consistent with §181.452(d)(2)(iii).

(c) Monthly shelter expenses include "rent". Many community spouses live in assisted living facilities where they pay a monthly "rent" that includes charges for living quarters, meals, certain utilities and other services. The regulation should define what portion of the charge imposed by an assisted living facility qualifies as "rent" when determining monthly shelter expenses.

4. The regulation must address the issues raised in Robbins v. DeBuono, 281 F.3d 197 (2d Cir. 2000). In Robbins, the Second Circuit held that requiring a transfer of the institutionalized spouse's Social Security income to the community spouse violated the anti-alienation provisions of the Social Security Act. Therefore, the regulation should specifically exclude the institutionalized spouse's Social Security income from the definition of MMNA at proposed §178.2.

5. In proposed §178.124(b)(2)(i)(B), the community spouse's income is said to include "interest and other income generated by the community spouse's resource determined under §178.123". The reference should be to the "spousal share of resources as determined under §178.122 or §178.123". More importantly, however, the regulation should state how the Department will determine the amount of interest or other income generated by the community spouse's resource allowance (i.e., the spousal share of resources as determined under §178.122 or §178.123). Currently, the Department assumes that the spousal share earns a rate of interest equal to 3% per year. At one time, they assumed a 5% rate of return. They seem to make changes to this rate at their whim. The regulation should state a methodology for making this determination. I would suggest that the Department assume that spousal share earn a rate of return equal to the 90-Day Treasury bill rate in effect at the time of application.

6. Section 178.124(b)(2)(vii) would be more accurate if the introductory clause were restated to read as follows: "(vii) The MMNA shall exceed the amount determined in subparagraph (vi) if either of the following apply: ....".

7. Section 178.124(b)(2)(viii) is confusing and shows that the Department has struggled with its own definitional framework. Once again, the Department should abandon this structure and adopt a construction that is consistent with the federal law. Assuming the Department is committed to this framework, the following changes are in order:

(a) Section 178.124(b)(2)(viii) makes a reference to the "resource allowance as determined under §178.123". The reference should to the "spousal share of resources as determined under §178.122 or §178.123".

(b) Section 178.124(b)(2)(viii) makes a reference to the "allowable deductions in §181.452(d)". Section 181.452(d)(2) includes a deduction for the maintenance needs of the spouse, which the Department now seeks to deal with in §178.124(b)(2). This highlights the need to make conforming changes to §181.452(d)(2) if new §178.124(b)(2) is to make any sense whatsoever.

(c) Section 178.124(b)(2)(viii) speaks of the institutionalized spouse's income being insufficient to raise the community spouse's income to the MMNA. The reference to MMNA does not make sense since MMNA is defined at §178.2 as the amount of income that the institutionalized spouse can contribute to the community spouse.

(d) Section 178.124(b)(2)(viii)(B) is confusing. It should be revised to read as follows: "(B) Subparagraph (A) hereof applies only if the institutionalized spouse actually gives the MMNA to the community spouse."

(e) Subparagraph (A) of §178.124(b)(2)(viii) should be revised so that it is mandatory to increase the "spousal share of resources" if the requirements of subparagraph (viii) are met. Such an increase would be mandatory under 42 U.S.C. §1396r-5(e)(2)(C). Current §178.124(b)(2) uses mandatory language as well.

D. Miscellaneous Issues Requiring Regulatory Review Scrutiny

1. The Department states that no additional forms or paperwork will be required to implement these changes. This seems incorrect. As required by federal law, the Department now requires that an Admissions Notice Packet (MA 401) be given to each resident upon admission to a nursing facility. This Admissions Notice Packet includes an explanation of the current "resource-first" rule. At a minimum, therefore, the Department will have to revise this publication if the "income-first" initiative is implemented.

2. The preamble states, "This proposed rulemaking will be effective upon publication in the *Pennsylvania Bulletin* as final-form rulemaking." Without further clarification as to the effective date of these changes, there will be tremendous confusion. For example, as part of the *Hurly* settlement, the Department routinely entered into stipulations granting enhanced spousal resource allowances. The final-form regulation should make it clear that any stipulations entered into before publication of the final-form regulation are not effected by the change. In addition, the final-form regulation should state that it only applies to medical assistance applications filed after a particular date. That date could be the date the final rule is published in the *Pennsylvania Bulletin*, or preferably a date that is 60 days after publication of the final rule. This latter alternative would give County Assistance Offices, nursing facilities and the public time to adjust to the change.

## II. PARTIAL MONTH OF INELIGIBILITY—SECTION 178.104(d)

A. The Regulation Lacks Clarity and Conflicts with Other Regulations and Statutes

Proposed §178.104(d) imposes a period of ineligibility when assets are transferred by an individual or an individual's spouse on or after the look back date. However, federal law at 42 U.S.C. §1396r-5(c)(4) specifically states that after the month in which institutionalized spouse becomes eligible for medical assistance, the resources of the community spouse are no longer deemed available to the institutionalized spouse. This provision specifically supersedes the transfer penalty provisions. See 42 U.S.C. §1396r-5(a)(1). Current Pennsylvania regulations incorporate this same requirement. §178.124(c)(2). Therefore, it is impermissible to impose a period of ineligibility on the institutionalized spouse for assets transferred by the community spouse after the institutionalized spouse becomes eligible for medical assistance. That is, "post-eligibility" transfers by the community spouse cannot be penalized. The Health Care Financing Administration (now known as the Centers for Medicare and Medicaid Services) agrees with this interpretation[2]. Accordingly, §178.104(d) should be revised to clarify that no period of ineligibility is imposed for assets transferred by an individual's spouse after that individual becomes eligible for medical assistance.

## II. CONCLUSION

Thank you for the reviewing these comments. I would welcome the opportunity to have further input as you work toward the adoption of final-form regulations.

Very truly yours,

Robert Clofine

Enclosure

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

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

Richard Sandusky (w/enclosure)
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

[2] The Health Care Financing Administration's (HCFA) view on this issue was recently addressed in a letter dated April 5, 2000 from Ronald Preston, Associate Regional Administrator for HCFA Region 1 to Brian E. Barreira, Esquire. Attorney Barreira notified HCFA that the Massachusetts equivalent of the Department of Public Welfare was penalizing post-eligibility transfers by the community spouse. HCFA advised Attorney Barreira that such a position was contrary to federal requirements, and that it would notify the state Medicaid agency that its policy needed to be revised. A copy of the Preston/Barreira letter is enclosed.

DEPARTMENT OF HEALTH & HUMAN SERVICES

HEALTH CARE FINANCING
ADMINISTRATION

Division of Medicaid and State Operations

Region I
JFK Federal Building
Government Center
Boston, MA 02203

April 5, 2000

Brian E. Barreira, Attorney-At-Law
225 Water Street
Suite 212
Plymouth, Massachusetts 02360

Dear Mr. Barreira:

This is in reply to your letter concerning transfer of assets by community spouses. You advised us that it is the position of the Division of Medical Assistance (DMA) that the post-eligibility transfer made by community spouses causes Medicaid disqualification. Thus, you requested that we notify DMA of its need to come into compliance with Federal law.

Under the transfer of assets provisions in §1917(c) of the Social Security Act (the Act), transfers between spouses are exempt from any transfer penalty. Under the spousal impoverishment provisions of §1924 of the Act, once eligibility is determined, the resources of the community spouse are no longer considered available to the institutionalized spouse. Thus, after the month in which an institutionalized spouse is determined eligible for Medicaid, any resources belonging to the community spouse are solely the property of that spouse. That is, the community spouse can do whatever he or she wants to with them.

We will be writing a letter to Mark E. Reynolds, Acting Commissioner, DMA, advising him that State policy needs to be revised to be consistent with Federal requirements. We appreciate your interest in the Medicaid program and for bringing this matter to our attention.

Please contact Allen Bryan if you have any questions. He can be reached at (617) 565-1246.

Sincerely yours,

Ronald Preston
Associate Regional Administrator

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#14-478-41

November 1, 2002

Office of Income Maintenance
Bureau of Policy

NOV 0 5 2002

REFER TO: Willie
Karole Aldridge
OLC
Harvey
File

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

**Re: Proposed Changes to the Resource and Income Provisions to the Medical Assistance Program; Published October 5, 2002, in the Pennsylvania Bulletin**

Dear Sir:

I am an attorney who has represented many older people in the public sector as well as private sector over the last twenty-seven years. Over the course of that time, I have seen where the Medical Assistance Program in Pennsylvania has been a godsend to our older citizens and their families facing long term care. I fully appreciate that the Department must limit costs. However, the proposal to change the resources for the community spouse so that Pennsylvania would follow the Income First Rule would have horrific affects on the poorest of our elderly citizens. In choosing this approach, Pennsylvania Department of Welfare is very shortsighted. The problem is that often the community spouse does not have sufficient income to support him or herself. This is frequently the case where the wife is the community spouse, because she has been a homemaker or worked part time and as a result has significantly lower income. While the institutionalized spouse is living, the result under both approaches ( Income First and Hurly), is to provide the low-income community spouse with the additional needed income. Under the Income First approach the problem arises when the institutionalized spouse dies and there is a drop in the income as a result of the reduced or eliminated pension benefits and reduced social security benefits. The community spouse is then at risk of being left with income below the poverty level and with inadequate resources remaining to generate the needed income. This can mean choosing between food and medications each month or providing for her own health care needs. The proposed change is against the public interest which is to prevent impoverishment of widows.

In converting to the Income First approach DPW fails to recognize the cost in losing the additional income of the institutionalized spouse. Pennsylvania Department of Welfare would lose all or part of the income of the institutionalized spouse since currently that goes towards costs of care of the institutionalized spouse. Consequently, not only is the proposed change contrary to the public interest, but is also "penny wise/pound foolish."

The same proposed regulations indicate that the institutionalized spouse must actually give his or her income for the monthly maintenance needs allowance. Such a provision is against federal law to the extent that 42 USC §407 provides that social security benefits of the institutionalized spouse are not assignable or transferable and are not subject to "execution, levy, attachment, garnishment or other legal process." My experience is that while most spouses will gladly give their income towards the other spouse, in some cases the parties have been estranged and would not voluntarily give the income. The current regulations provide for a voluntary transfer of income which is in compliance with federal law.

My esteemed colleague, Jeff Marshall, has written extensive comments to the regulation of which I concur. I will not repeat them as he has done an excellent job and ask you to give all serious consideration to his comments.

I strongly recommend that the proposed changes for Income First be rescinded from the regulations in their final form.

Respectfully submitted,

Dana M. Breslin

DMB:njm
cc: The Honorable Harold F. Mowery, Jr.
The Honorable Vincent Hughes
The Honorable George Kenney, Jr.
The Honorable Frank Oliver
Dennis O'Brien
Independent Regulatory Review Commission

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PENNSTATE

The Dickinson
School of Law

**ELDER LAW CLINIC**

**The Dickinson School of Law**
**The Pennsylvania State University**
**150 South College Street**
**Carlisle, PA 17013-2899**

**Clinic Message Line:**
**717-240-5152**
**Prof. Katherine Pearson**
**717-240-5219**
**Fax: 717-240-5126**
**(Attn: Elder Law Clinic)**

#14-478-31

Office of Income Maintenance
Bureau of Policy

NOV 04 2002

REFER TO: Karle Aldridge
Willie
OLC
Horner
File

November 1, 2002

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

**Re: Proposed Regulations Affecting 55 PA. Code Chapts. 178 and 181**

Dear Director Zogby:

The Dickinson School of Law of The Pennsylvania State University has an Elder Law Clinic and Workshop. As part of the studies in this program, one of our students has chosen to evaluate the proposed amendments to the Pennsylvania Public Welfare regulations that would change Pennsylvania from a resource-first approach to an income-first approach for protecting community spouses from impoverishment.

The following discussion comprises my student's evaluation of this proposed amendment and I join with her assessment and recommendation against adoption of an income-first approach. We are offering this evaluation pursuant to the comment period provided in the *Pennsylvania Bulletin* that appeared on October 5, 2002.

Introduction:

The Department of Public Welfare's proposed regulations regarding amendments to Chapters 178 and 181 are a frightening reflection of the financial priorities of the government of the Commonwealth. If approved, the proposed regulations would devastate a portion of one of our most valuable resources, the elderly. The fiscal concerns of the Commonwealth are quite understandable given the state of the nation's finances. However, the community spouses seeking long-term care for their loved ones should not be the ones to feel the financial pinch.

Background:

Under the *Blumer* decision the Legislature undoubtedly has the power to change Pennsylvania from a resources-first state to an income-first state. See *Wisconsin v. Blumer*, 543 U.S. 473 (2002). But is this really the right thing to do? The purpose of either method is to comply with the important goal identified by the U.S. Congress to prevent community spouses from becoming impoverished. 42 U.S.C.A. § 1396r-5. However, under the income-first approach the ends do not seem to justify the means.

The underlying justification for eliminating the Commonwealth's "annuity rule" procedure and implementing the income-first rule is the budget for the 2002-2003 fiscal year. Representative Brooks stated that the revenue shortfall is projected to be at least one billion dollars. This is a staggering amount of money when compared to the estimated amounts that an income-first method could save. The *Governor's Executive Budget for Fiscal Year 2002-2003* estimates a total savings of $2.35 million, $1.28 million of which will belong to the federal government. This leaves the Commonwealth's actual savings at a mere $1.07 million, constituting only 1/100th of the Commonwealth's entire revenue shortfall. Is making Pennsylvania an income-first state really worth the inevitable financial harm to the elderly?

In essence, the income-first approach punishes an elderly person whose spouse has been institutionalized. Not only is the community spouse("CS") left to deal with the emotional, mental, and spiritual devastation of having his or her best friend and life partner institutionalized, but now the CS is forced to contemplate the enhanced likelihood of poverty after the institutionalized spouse ("IS") dies. When an elderly person is admitted to a long-term care facility it is often with the understanding that the IS will not return home again. It is also at this time that the CS bears the mental burden of determining whether she or he will be able to provide him/herself with the means upon which to live after the death of the IS.

Currently, the resources-first method allows the CS to keep enough of the couple's total countable resources beyond the standard spousal share as is necessary to purchase an unguaranteed single lifetime commercial annuity sufficient to generate the additional income necessary to meet his or her minimum monthly maintenance needs allowance ("MMMNA") for the duration of his or her life. If the CS does not have a fully funded MMMNA after allocation of all of the couple's available assets, a contribution from the monthly income of the IS is allowed.

Conversely, the income-first method includes not only the CS's actual income but also an anticipated post-eligibility community spouse monthly income allowance ("CSMIA") that makes it less likely that the community spouse resource allowance will be increased. Consequently, it tends to require couples to expend additional resources before the institutionalized spouse becomes eligible for Medical Assistance ("MA"). The resources-first method does not even consider the CSMIA.

So instead of allowing the CS to retain some of his or her assets that can be used to generate additional resources, the CS is forced to spend these resources to provide for the IS's care. This means that upon the IS's death, the CS will be left with even less money than he or she would have had under a resources-first method. In reality, the monthly monetary difference for most community spouses is a matter of mere dollars. But for an elderly citizen who already has a fixed income, those few dollars can make a great different in quality of life. It does not make economic sense to take money away from an age group that has few resources and even fewer means of acquiring additional income.

Analysis:

Historically, as well as presently, the majority of community spouses are women. Most have either worked as homemakers and mothers or have left the work force for periods of time to raise children. This fact already significantly lowers the amount of money they are receiving as their own income. And as this income declines, expenses often increase. The economy of the entire nation is suffering right now and consequently prices are rising. Not unaffected by this are prescription drugs. The CS, though not presently in need of long term institutional care, is almost always consuming a number of prescription drugs him/herself. If these elderly are denied the additional resources allotted to them through the resources-first method, they may not have the means to maintain their own health and autonomy and consequently that could cast an even greater burden on the Commonwealth by ultimately forcing them into institutions, and health programs like the already troubled PACE program.

These regulations should not be seen as temporary and as only having an immediate impact upon the Commonwealth's elderly who are considering institutionalization in the near future. These proposed regulations are a threat to many married Pennsylvanians including those who are far from old age. The complexity and lengthiness of the amendment process very nearly insures that if these amendments take effect they will be permanent. This means that not only will mothers, grandmothers, and great-grandmothers be impoverished, but so too will wives, sisters, and very possibly you and I.

One must contemplate the threat that this change poses. Elderly couples, if they are even aware of the income-first method, may seek to take care of each other as long as possible. This threatens the health of both spouses. The one in need of the care will likely not receive the level of care necessary and the spouse providing the care will simultaneously compromise his or her own health. Also, couples may shift resources far in advance of institutionalization in order to have some means on which the CS will be able to live in later years. Ultimately, this could take even more money away from the government because these funds would not be included when tabulating the Community Spouse Resource Allowance ("CSRA"). The IS would then be eligible for Medical Assistance at an earlier date. It seems unreasonable that the Commonwealth would wish its citizens to devise a way to "beat the system."

Conclusion:

Changing Pennsylvania from a resource-first state to an income-first state would be devastating for many of the elderly. No one should be financially punished because his or her spouse needs long-term institutionalized care. Rarely do the elderly ill wish to be institutionalized and perhaps even fewer healthy spouses wish the ill spouse to be institutionalized. These couples realize that the long-term care facility will most likely be the place where the IS will die. It is cruel to choose the narrowest means of complying with the federal mandate to protect community spouses, and thereby to increase their financial burden at the same time that they are struggling with emotional, spiritual, mental, and physical demands caused by institutionalization of loved ones.

The Elder Law Clinic and Workshop are also aware of the other concerns of the Pennsylvania Bar Association Elder Law Section with regard to the proposed amendments to calculation of transfer penalties, section 178.174(b), the limit on unpaid medical expenses, section 181.452(d), and elimination of the home maintenance deduction, section 181.452(d). Though we have chosen to focus narrowly on the proposed amendments regarding the change to the income-first approach, section 178.124(b), we support the views of the Pennsylvania Bar Association Elder Law Section with regard to the other proposed amendments.

Sincerely,

Genevieve Kolasa

Genevieve Kolasa
Law Student

Reviewed and approved by:

Katherine C. Pea

Katherine C. Pearson
Professor of Law

GK:lw

#14-478-49

Original: 2299

Office of Income Maintenance
Bureau of Policy

NOV 0 7 2002

REFER TO: Karole Aldridge
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**NAMI PENNSYLVANIA**
**Delaware County Chapter**
*P.O. Box 1493*
*Havertown, PA 19083*

November 1, 2002

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

Dear Mr. Zogby:

I am writing on behalf of the Delaware County Chapter of the NAMI- PA (Pennsylvania's Voice on Mental Illness). Our Chapter has membership in excess of 200 families in Delaware County.

I have learned with alarm that DPW is proposing regulations to eliminate NMP spend down under Medical Assistance. This can only be a humanitarian disaster for approximately 7,000 Pennsylvania citizens who are dependent on NMP spend down.

Many of the 7,000 individuals suffer severe mental illnesses. Their mental stability and ability to live in the community are achieved only with medications which often cost hundreds of dollars per month. (The Medical Assistance cost, of course, is less because of negotiated reimbursement rates.) These people often receive Social Security disability benefits only a little above the threshold for regular Medical Assistance. If they are forced to buy their medications on their own, they will be thrown into utter poverty. There is a danger that many of them will forgo medication, and then decompensate and be back in the hospital at much greater expense to the public. Some will find themselves unable to afford a place to live and will end up living on the street or staying in make shift shelters such as church basements.

How can Pennsylvania balance its budget on the backs of its most needy and vulnerable citizens? That will be a humanitarian disaster right in our own backyard - not in some war-torn overseas country.

Therefore, I urge you on behalf of both the directly affected individuals and their families and loved ones not to issue the regulations which will deprive our neediest citizens of the opportunity to get prescriptions under the NMP spend down plan.

Respectfully yours,

Daniel R. Fredland
Secretary

cc: Independence Regulatory Review Commission
Editor, *Delaware County Daily Times*

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