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September 21, 2011

Written submission to the Subcommittee on Health Care, District of Columbia, Census and the National Archives

Topic: Examining Abuses of Medicaid Eligibility Rules

My name is Janice Eulau and I have been employed by the Suffolk County New York Department of Social Services for the past 36 years. I currently serve as the Assistant Administrator for the Medicaid program in that county. Approximately 180,000 individuals receive Medicaid in Suffolk with 5,300 in receipt of nursing home care. In 2010 nursing home care for those 5,300 recipients cost $429.9 million with a federal share of $213.7 million.

> **Attachment 1** lists Medicaid expenditures in Suffolk County New York for 2010. Nursing Home Care accounts for approximately 24% of the total expenditures.

As a long time employee of a local Medicaid office, I have had the opportunity to witness the diversion of applicants' significant resources in order to obtain Medicaid coverage. It is not at all unusual to encounter individuals and couples with resources exceeding a half million dollars, some with over one million.

There is no attempt to hide that this money exists; there is no need. There are various legal means to prevent those funds from being used to pay for the applicant's nursing home care.

Wealthy applicants for Medicaid's nursing home coverage consider that benefit to be their right, regardless of their ability to pay themselves. There is limited understanding that Medicaid for nursing home care remains a means-tested government program, not an entitlement program. This misunderstanding seems to be perpetuated by the Elder Law and Medicaid Estate Planning industry.

A tool most often used by single clients is the promissory note. Half of the applicant's excess resource is transferred to the children without compensation. This transfer results in a penalty period where Medicaid will not pay for nursing home care, approximately 1 month for every $10,000 transferred. The other half of the excess resource is also transferred to the children, but in return for a promissory note which will produce an income stream to cover the cost of care during the penalty period. Our county regularly sees promissory notes in excess of $150,000 with matching uncompensated transfers.

> **Attachment 2** is a copy of the website of a Elder Law Attorney explaining the process of preserving assets through the use of a promissory note.

For couples, the most common method of preserving resources is spousal refusal. In this case, the spouse in the nursing home transfers all resources beyond those he is allowed to keep to the well spouse living at home, since transfers to a spouse do not incur a penalty period. In New York the institutionalized spouse may retain $13,800, the spouse living at home can retain up to $109,000. In addition, the home and pre-paid burial expenses are exempt. Any amount in excess of these resources is deemed available to meet nursing home costs. However, federal law allows the spouse at home to refuse to support the applying spouse and requires states to then base the Medicaid eligibility determination on the income and assets of only the applying spouse. States have the right to bring support proceedings against the refusing spouse. My county has pursued the refusing spouse in the past, however family court is only able to address the excess income and attach resources for past Medicaid payments. Any further proceedings would need to be addressed in NeW York's Supreme Court, a process that would take months or years for each case and strain our limited local resources.

> **Attachment 3** includes the federal regulation for the "Treatment of income and resources for certain institutionalized spouses (42 USC 1396r-5).

Attachment 4 is a form supplied by the Human Resources Administration of the City of New York to be completed by any legally responsible relative refusing to support their spouse or minor child. The form advises that the refusing individual may be taken to court for failure to support the Medicaid recipient.

Attachment 5 is the copy of a website of an Elder Law Attorney explaining the process of spousal refusal and its use in New York. The author again comments that other states are not allowing spousal refusal and failing to follow federal statute.

The remedy for these abuses lies in education as well as changes to law. Many seniors believe that Medicare and their supplemental insurance policies will pay for their nursing home care, when, in fact, these policies will only pay up to 100 days of care, and only under certain circumstances. Medicare communication through their annual handbook and on their official website is woefully lacking information in this area. Not surprisingly, wealthy seniors fail to realize the value or need for Long Term Care Insurance. Having a better understanding of the limits of Medicare would enable seniors to make timely and informed decisions regarding their future care needs.

I also respectfully suggest that the law allowing spousal refusal be adjusted to enforce the current resource limits and allow the spouse at home to petition the court for higher resource levels should his/her circumstances call for such an increase instead of requiring the state to address each refusal. Allowing wealthy spouses to ignore their financial responsibility to one another is a policy we cannot afford.

Attachment 6 is a copy of a website listing excerpts from an undated presentation to the National Academy of Elder Law Attorneys. Comments include a participant questioning why the statute included as attachment 1 above is not followed in states other than New York, Florida and the District of Columbia. Based on the comments and information in the article, it appears that it was written prior to the Deficit Reduction Act of 2005, however the basic premise of spousal refusal remains the same.

In closing, I would hope that the Medicaid program can fulfill its original mission to provide quality health coverage to individuals who are unable to afford such care or the insurance to pay for care. However, individuals with resources above and beyond the level prescribed by law should not be allowed to fund their children's inheritance while the taxpayers fund their nursing home care. I strongly believe that this is not a partisan issue. I also believe in the merits of the Medicaid program, but feel just as deeply that these issues regarding resource diversion need to be addressed.

Thank you.

ATTACHMENT 1

ATTACHMENT 2

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Call Today: (716) 542-5444

PROMISSORY NOTES FOR EMERGENCY MEDICAID PLANNING

by admin on January 8, 2009

in Buffalo NY Elder and Estate Law

It is not too late to preserve assets after a patient is admitted to a nursing home. Promissory notes can be used to protect the assets of patients who are currently in nursing homes.

STEP ONE: Do not take any action without first consulting with an attorney. Medicaid laws are constantly changing and subject to various interpretations.

STEP TWO: The patient makes a gift of half of his or her assets.

STEP THREE: The patient simultaneously lends the excess resources (those above $13,050) in return for a promissory note which will produce an income stream. The patient is now eligible for Medicaid, but for the gift. Fair hearing decisions have approved the use of promissory notes in establishing Medicaid eligibility as a transfer for value, not a gift if four requirements are met.

First, the promissory note must be actuarially sound. The repayment term of the loan must not last longer than the life expectancy of the lender.

Second, payments must be made in equal amounts during the term of the loan with no deferral of payments and no balloon payments.

Third, the note can not be cancelable upon the death of the lender.

And **Fourth**, it must be non-negotiable.

STEP FOUR: The patient files a Medicaid application.

STEP FIVE: The Medicaid application is denied solely on the basis of this uncompensated transfer. The denial is official notification that the penalty period has commenced. The penalty period begins when three conditions are met:

(1) a gift is made;

(2) the patient is in need of long term care services and;

(3) He or she is determined to be "otherwise eligible" (the Medicaid application would have been approved except for the uncompensated transfer.) To be eligible for Medicaid, the patient's resources must be no greater than $13,050 and the monthly private pay cost of the nursing home must

exceed his or her income. The number of months of ineligibility (the penalty period) is calculated by dividing the value of the gift by the average monthly cost of nursing home care at the "regional rate."

STEP SIX: The monthly repayments under the note are used to pay for the cost of the nursing home during the penalty period.

STEP SEVEN: When the penalty period expires, the applicant can file a second Medicaid application that should be approved.

The Erie County, New York Department of Social Services approved two Medicaid applications in June 2008 that used a promissory note as a planning technique. The applicants were able to preserve approximately one-half of their assets. Here are those two examples.

Application # 1: $153,775 was gifted in February 2008 and $167,700 was exchanged in return for a promissory note dated February 29, 2008 payable over a period of twenty-three months at an interest rate of 6%. The $153,775 gift resulted in an ineligibility period of 21.76 months, with eligibility established as of 12/1/09.

Application # 2: $32,094.61 was gifted in January 2008; $34,700 was exchanged in return for a promissory note dated January 30, 2008 payable over a five month period at an interest rate of 6%. The $32,094.61 gift resulted in a period of ineligibility of 4.54 months, with eligibility established as of June 1, 2008.

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ATTACHMENT 3

42 USC 1396r-5 Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses

(1) Supersedes other provisions

In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1) of this section), the provisions of this section supersede any other provision of this subchapter (including sections 1396a (a)(17) and 1396a (f) of this title) which is inconsistent with them.

(2) No comparable treatment required

Any different treatment provided under this section for institutionalized spouses shall not, by reason of paragraph (10) or (17) of section 1396a (a) of this title, require such treatment for other individuals.

(3) Does not affect certain determinations

Except as this section specifically provides, this section does not apply to—

(A) the determination of what constitutes income or resources, or

(B) the methodology and standards for determining and evaluating income and resources.

(4) Application in certain States and territories

(A) Application in States operating under demonstration projects

In the case of any State which is providing medical assistance to its residents under a waiver granted under section 1315 of this title, the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this subchapter.

(B) No application in commonwealths and territories

This section shall only apply to a State that is one of the 50 States or the District of Columbia.

(5) Application to individuals receiving services under PACE programs

This section applies to individuals receiving institutional or noninstitutional services under a PACE demonstration waiver program (as defined in section 1396u–4 (a)(7) of this title) or under a PACE program under section 1396u–4 or 1395eee of this title.

(b) Rules for treatment of income

(1) Separate treatment of income

During any month in which an institutionalized spouse is in the institution, except as provided in paragraph (2), no income of the community spouse shall be deemed available to the institutionalized spouse.

(2) Attribution of income

In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d) of this section, except as otherwise provided in this section and regardless of

any State laws relating to community property or the division of marital property, the following rules apply:

(A) Non-trust property

Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides—

(i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(iii) if payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(B) Trust property

In the case of a trust—

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this subchapter (including sections 1396a (a)(17) and 1396p (d) of this title), and

(ii) income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust—

(I) if payment of income is made solely to the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(II) if payment of income is made to both the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(III) if payment of income is made to the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(C) Property with no instrument

In the case of income not from a trust in which there is no instrument establishing ownership, subject to subparagraph (D), one-half of the income shall be considered to be available to the institutionalized spouse and one-half to the community spouse.

(D) Rebutting ownership

The rules of subparagraphs (A) and (C) are superseded to the extent that an institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provided under such subparagraphs.

(c) Rules for treatment of resources

(1) Computation of spousal share at time of institutionalization

(A) Total joint resources

There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse)—

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to 1/2 of such total value.

(B) Assessment

At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of resources, the State shall promptly assess and document the total value described in subparagraph (A)(i) and shall provide a copy of such assessment and documentation to each spouse and shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this subchapter, the State may, at its option as a condition of providing the assessment, require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2) of this section.

(2) Attribution of resources at time of initial eligibility determination

In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property—

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

(3) Assignment of support rights

The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where—

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

(4) Separate treatment of resources after eligibility for benefits established

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

(5) Resources defined

In this section, the term "resources" does not include—

(A) resources excluded under subsection (a) or (d) of section 1382b of this title, and

(B) resources that would be excluded under section 1382b (a)(2)(A) of this title but for the limitation on total value described in such section.

(d) Protecting income for community spouse

(1) Allowances to be offset from income of institutionalized spouse

After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

(A) A personal needs allowance (described in section 1396a (q)(1) of this title), in an amount not less than the amount specified in section 1396a (q)(2) of this title.

(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(C) A family allowance, for each family member, equal to at least 1/3 of the amount by which the amount described in paragraph (3)(A)(i) exceeds the amount of the monthly income of that family member.

(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1396a (r) of this title).

In subparagraph (C), the term "family member" only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

(2) Community spouse monthly income allowance defined

In this section (except as provided in paragraph (5)), the "community spouse monthly income allowance" for a community spouse is an amount by which—

(A) except as provided in subsection (e) of this section, the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) Establishment of minimum monthly maintenance needs allowance

(A) In general

Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds—

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 9902 (2) of this title) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4)).

A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) Applicable percent

For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of—

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance

The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $1,500 (subject to adjustment under subsections (e) and (g) of this section).

(4) Excess shelter allowance defined

In paragraph (3)(A)(ii), the term "excess shelter allowance" means, for a community spouse, the amount by which the sum of—

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance (used by the State under section 2014 (e) of title 7) or, if the State does not use such an allowance, the spouse's actual utility expenses,

exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) Court ordered support

If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

(6) APPLICATION OF "INCOME FIRST" RULE TO REVISION OF COMMUNITY SPOUSE RESOURCE ALLOWANCE- For purposes of this subsection and subsections (c) and (e), a State must consider that all income of the institutionalized spouse that could be made available to a community spouse, in accordance with the calculation of the community spouse monthly income allowance under this

subsection, has been made available before the State allocates to the community spouse an amount of resources adequate to provide the difference between the minimum monthly maintenance needs allowance and all income available to the community spouse.[16]

(e) Notice and fair hearing

(1) Notice

Upon—

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse,

each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B) of this section), of the amount of any family allowances (described in subsection (d)(1)(C) of this section), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f) of this section, and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) Fair hearing

(A) In general

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of—

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B) of this section);

(iii) the computation of the spousal share of resources under subsection (c)(1) of this section;

(iv) the attribution of resources under subsection (c)(2) of this section; or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2) of this section);

such spouse is entitled to a fair hearing described in section 1396a (a)(3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance

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[16] Deficit Reduction Act, Pub. L. No. 109-171, § 6013. This section applies to transfers and allocations made on or after the date of enactment by individuals who became institutionalized spouses on or after such date. § 6013(b). Conf. Rep. 109 § 6013(a).

If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance

If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

(f) Permitting transfer of resources to community spouse

(1) In general

An institutionalized spouse may, without regard to section 1396p (c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) Community spouse resource allowance defined

In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which—

(A) the greatest of—

(i) $12,000 (subject to adjustment under subsection (g) of this section), or, if greater (but not to exceed the amount specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of

(I) the spousal share computed under subsection (c)(1) of this section, or

(II) $60,000 (subject to adjustment under subsection (g) of this section),

(iii) the amount established under subsection (e)(2) of this section; or

(iv) the amount transferred under a court order under paragraph (3);

exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) Transfers under court orders

If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of

resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1) of this section).

(g) Indexing dollar amounts

For services furnished during a calendar year after 1989, the dollar amounts specified in subsections (d)(3)(C), (f)(2)(A)(i), and (f)(2)(A)(ii)(II) of this section shall be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) between September 1988 and the September before the calendar year involved.

(h) Definitions

In this section:

(1) The term "institutionalized spouse" means an individual who—

(A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1396a (a)(10)(A)(ii)(VI) of this title, and

(B) is married to a spouse who is not in a medical institution or nursing facility;

but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.