MEDICAID TREATMENT OF INDIVIDUAL RETIREMENT ACCOUNTS

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This outline will discuss the Medicaid treatment of work related plans which provide income for retirement. These include Individual Retirement Accounts (IRAs), 401(k)s, 403(b)s, Keough accounts (for self employed individuals), pension plans, and Roth IRAs. Depending on the requirements established by the employer, some profit sharing plans are also considered retirement funds. For purposes of simplicity, all such accounts will be referred to as "retirement accounts" unless the outline specifically discusses a particular type of account.

I. Treatment for Applicant/Recipient

(A) New York State's Medicaid regulations at 18 N.Y.C.R.R Section 360-4.6 (b)(2)(iii) provide that "pension funds belonging to an ineligible or nonapplying legally responsible relative which are held in individual retirement accounts or in work-related pension plans, including plans for self-employed individuals such as Keogh plans" shall be disregarded as resources. "However, amounts disbursed from a pension fund to a pensioner are income …which will be considered in the deeming process" Although a strict reading of this regulation would appear to require that retirement accounts be treated in all instances as exempt resources, the interpretation of the regulation by the Medicaid program is quite complex.

(B) **Countable Resource** – If an elderly or disabled Medicaid applicant owns a retirement account, and is able to make withdrawals from the account, the account will be considered an available resource to the Medicaid applicant. The fund's value is the amount available to the individual after any penalty for early withdrawal. Any taxes due upon the distribution of the withdrawn funds are not deductible in determining the fund's value. If the individual is eligible for periodic retirement benefits, he or she must apply for those benefits or the Medicaid application will be denied. If the individual is not entitled to periodic payments but is allowed to withdraw any of the funds, the fund is an available resource to the extent of the funds available for withdrawal. See, NYS Department of Health Medicaid Reference Guide ("MRG") at 316; SSA POMS Section SI 01 120.210.

(C) **Exempt Resource-** If the Medicaid applicant owns a retirement account but is in receipt of, or has elected to receive, "periodic payments" from the account, the retirement account is not a countable resource. See Department of Health Medicaid Reference Guide ("MRG") at 316 and General Information System Message ("GIS") 98 MA/024 (issued to clarify the statewide policy and treatment of retirement funds).

The applicant, if eligible, must apply for "periodic payments" from the retirement account in order to be eligible for Medicaid. The MRG at p.317 states that, the applicant must apply for "maximized" benefits as a condition of eligibility. GIS 98 MA/024 states that the Medicaid applicant "must choose the maximum income payment that could be made available over the individual's lifetime". The placing of the retirement account into "periodic payment" status will result in the principal of the retirement account no longer being treated as an "available resource" although the stream of payments will be treated as "income" in the Medicaid eligibility process.

(D) **Exceptions:**

(a) Effective October 1, 2011, retirement funds of an individual who participates in the Medicaid Buy-In Program for Working People with Disabilities, or his or her spouse, are disregarded regardless of whether these funds are in "periodic payment" status. See Chapter 59 of the Laws of 2011, 11 OHIP/ADM-07 and MRG p. 391. In addition, since 2010, pregnant women and children who apply for Medicaid are no longer required to document their resources.

(b) GIS 98 MA/024 states that a retirement account is not a countable resource if the individual has elected to receive periodic payments which are less than the maximum periodic payment which is available **and** the election is irrevocable.

(c) An applicant who has met the minimum benefit duration requirement of a New York State Partnership for Long Term Care policy is not required to maximize income from a retirement account.

(E) **What constitutes Periodic Payments**? Many county Departments of Social Services require that the Medicaid applicant take distributions from retirement accounts in accordance with life expectancy tables utilized by the Social Security Administration. However, other counties treat retirement accounts as exempt resources if an applicant is over the age of 70 ½ and is taking only the minimum required distribution ("RMD") required by the IRS Tables. Many permit the use of the IRS RMD tables for married applicants, but require the use of the Social Security tables for single individuals. See, annexed Memorandum dated July 15, 2014 from the Oneida County Department of Social Services Legal Division which indicates that the SSA tables shall be used for single individuals but that the IRS RMD may be used for married individuals who are subject to spousal budgeting. The memo indicates that this interpretation was the result of a conversation between the writer and Eileen Brennan of the NYS Office of Medicaid Management.

(F) **Social Security Life Expectancy Tables**. Prior to the adoption of the Deficit Reduction Act, local Departments of Social Services generally used a life expectancy table which was annexed as Attachment IV to 96 ADM-8. In 2006, an updated life expectancy table based upon values established by the Social Security

Administration was annexed as Attachment VIII to O6 OMM-05. The Department of Health has issued periodic updates to the life expectancy table as the Social Security Administration issues new tables. The latest table was annexed as an exhibit to GIS 12 MA/012 which was issued by the Department of Health in July 2012 and is annexed to these materials. This table will be subsequently referenced as the "Social Services" life expectancy table.

(G) **Fair Hearing Decisions**: Several Fair Hearing decisions have concluded that retirement accounts were not countable resources even though the Medicaid applicant/recipient was taking a periodic payment which was less than the distribution which would be required under the Social Services life expectancy table:

> In Matter of Arnold S. FH # 3701203H (Monroe County, May 28, 2002) the Commissioner's Designee concluded that once the applicant has applied for or received periodic payments, the retirement account is no longer considered an available resource even though the local Social Service department argued that the applicant's election was not irrevocable and the applicant had the ability to receive the entire amount from the retirement account. Both the applicant and applicant's wife had retirement accounts and had elected monthly payments in excess of the required minimum distribution amount, but less than the amount required by the SSA table. Since the applicant and his wife were both receiving periodic payments, the retirement accounts were determined not to be countable resources. The decision does not address the issue of whether a retirement account would be exempt if the account owner was only taking the required minimum distribution. The decision also does not reach the issue of what distribution is required for an individual who is under the age of 70 ½ and not subject to the requirement to take a required minimum distribution under the IRS Tables.
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> In Matter of Kern, FH #3873663J, (Monroe County, July 8, 2003) the 78 year old Medicaid applicant had elected to receive regular monthly payment of the required minimum distribution amount from his retirement account. The payout under the RMD would take place over a life expectancy of 19.2 years. The applicant had a 73 year old wife in the community. The local agency requested that the applicant increase the monthly payments to an amount which would payout over 7.83 years, as required by the Social Services life expectancy table. The agency's request would have increased the monthly payments from $915 to $2,150.67 per month! The applicant did not comply with the request and the agency denied the Medicaid application. The Commissioner's designee determined that "there is simply no current legal authority supporting the policy objective of requiring a "maximum income payment option" in cases involving a community spouse. While there is legal authority for an individual seeking Medicaid to generally be so required, there exists no legally-sanctioned longevity table for use in any case involving a couple."

In Matter of Appeal of _____, FH # 5337190Z (Suffolk Co. August 3, 2009) a married 76 year old Medicaid applicant had a 68 year old spouse living in the community. The applicant had elected to take periodic distributions from his retirement account based upon the life expectancy table applicable to his wife. The County took the position that the Medicaid applicant and his wife were both required to maximize the distributions from the retirement accounts using the life expectancy table annexed to 06 OMM/ADM 5. The decision concludes "the Agency's reliance on (these life expectancy tables) is an error of law…Under the IRS code, the RMD of IRAs should be based on the IRS tables." The decision notes that the applicant was taking his periodic distribution based upon the life expectancy of his wife and that this distribution was greater than the RMD.

(H) **Distributions Prior to age 70 1/2**: If the applicant is under the age of 70½, all counties require the use of the Social Services life expectancy table to determine the required pay-out to the applicant. If the applicant is over 59½ or is disabled, the applicant can take payments from the account without imposition of the 10% early withdrawal penalty tax. See, IRC §72(t)(2)(A)(iii). Disability is defined at IRC §72(M) as inability "to engage in ***any*** substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be disabled unless he furnishes proof of the existence thereof in such form and manner as the Secretary may require." (Emphasis supplied.)

(I) **Practice Tip:** Due to recent changes in OMRDD and OMH policies, disabled individuals who live in congregate housing will now be billed at increased rates for their residential services, unless they are on Medicaid. Many of these disabled individuals work on a part time or full time basis but would find their income substantially diminished if they were forced to pay the full freight for congregate housing. If these individuals apply for Medicaid under the Medicaid Buy-In Program for Working People with Disabilities, their eligibility will be determined without regard to the assets they hold in retirement accounts and they will not be required to take any current distributions from the accounts. See, Chapter 59 of the Laws of 2011, 11 OHIP/ADM-07 and MRG p. 391.

(J) **Advocacy Tip:** Individuals who are younger than 59 ½ or are still working may not be eligible to receive payments from their retirement account. If the Medicaid applicant is not eligible to receive distributions from the retirement account, the account is not an available resource and is exempt. Submit a letter from the plan administrator to verify the inability to withdraw funds from the account. See, MRG at p.316: "A retirement fund is not a countable resource if an individual must terminate employment in order to obtain any payment"

(K) **Income** – The amount of income received from a retirement account is treated as unearned income of the Medicaid applicant. 98 MA/024 states at p. 2:

"Once an individual is receiving periodic payments, the payments are counted as unearned income on a monthly basis, regardless of the actual frequency of the payment. For example, if the periodic benefit is received once a year, the amount is to be divided by twelve to arrive at a monthly income amount."

(L) **Lump Sum or Non-Regularly Recurring Distributions**: The MRG at p. 316 provides the following: "**NOTE**: That the SSI-related individual may choose to take money out of a retirement account on a non uniform and/or inconsistent basis. An example would be an individual electing to withdraw $350 from a retirement fund in February and $600 in October. These irregular withdrawals are not treated as periodic payments. The non-periodic distributions are considered a conversion of a resource and not countable income. In this instance, the retirement fund is treated as an available, countable resource."

(M) **Practice Tip:** Individuals who apply for Medicaid may have recently taken distributions from their retirement accounts which are greater than the distribution required by the RMD or the Social Services table. Similarly, applicants may have taken irregular and inconsistent distributions from their retirement accounts. In these instances, the applicant should be advised to send a letter of instruction to the account administrator to reduce the prospective payments and/or establish a prospective monthly distribution of an amount which will satisfy the local Department of Social Services. Some counties will accept such a letter of instruction as sufficient proof of the prospective periodic payment. However, others may take the position that the full amount of the distribution taken in the year prior to the Medicaid application must be used in calculating the income attributed to the retirement account. Although the IRS permits a taxpayer to calculate the total RMD required from all retirement accounts and then permits the taxpayer to take the total RMD from any one, or several of the accounts, this rule does not apply to the Medicaid program. The Medicaid applicant should be advised to place each retirement account into periodic (i.e. monthly) payment status.

(N) **Practice Tip**: For community Medicaid applicants, surplus income, including distributions from retirement accounts, may be placed into a self-settled or pooled income supplemental needs trusts. Consider whether it may be advisable to take a larger distribution from the retirement account than the Social Services table requires so that the trust will have sufficient funds to pay the income taxes which will be generated by the distributions from the retirement account and the Medicaid recipient will have sufficient income to pay all anticipated household expenses.

(O) **Roth IRAs**. There is no specific discussion of Roth IRAs in the SSI POMS, the regulations, the administrative directives or the MRG. There is no IRS requirement for the Roth owner to take required minimum distributions after age 70 ½. However, since a Roth IRA can be placed into a period payment status, it should be subject to the rules that apply to any other retirement accounts. Note that the Deficit Reduction Act treats Roth IRA's the same as any other qualified plans or retirement accounts, thereby lending support to the argument that Roth IRAs should be treated the

same as any other retirement account and therefore be exempt if placed into "periodic payment" status. Anecdotal evidence provided to the author indicates that most county social services departments treat Roth IRA's the same as all other retirement accounts.

(P) **How to Calculate the Required Minimum Distribution:** Most Social Services offices will request written documentation from the account administrator of the required minimum distribution amount ("RMD".) However, if the Medicaid applicant is unable to obtain the RMD from account administrator, the amount can be easily calculated by following the directions set forth in IRS Publication 590. The RMD is calculated by dividing the account balance as of the close of business on December 31st of the preceding year by the applicable distribution period or life expectancy. The distribution period is listed in Table III, the Uniform Lifetime Table, which is annexed as Exhibit C to IRS Publication 590.

II. Treatment of Retirement Assets Held by the Community Spouse

(A) **Exempt Resource** – 18 N.Y.C.R.R. §360-4.6 (b)(2)(iii) states that retirement accounts of a nonapplying legally responsible relative are a disregarded resource of the Medicaid applicant. However, any amount disbursed to the spouse will be considered as income considered in the deeming process. In contrast, and perhaps contradiction to this provision, a December 21, 2005 amendment to 18 N.Y.C.R.R. §360-4.10(a)(9) states that "Resources do not include those disregarded or exempt under sections 360-4.4(d), 360-4.6(b) and 360-4.7(a)… except that pension funds belonging to a community spouse which are held in (retirement accounts) are countable resources of the community spouse for purposes of determining the institutionalized spouse's eligibility and calculating the amount of any community spouse resource allowance."

(1) Prior to the recent amendment to the regulations at 460-4.10 (a)(9), New York's policy provided that the principal balance of the community spouse's retirement accounts would first be counted toward the community spouse's resource allowance ("CSRA") and that any excess in the retirement accounts would be considered exempt and not available to the institutionalized spouse. See 90 ADM-36 and GIS 98 MA/024. Although the excess resources were exempt, the inclusion of the retirement accounts towards the calculation of the CSRA could cause non-retirement funds to exceed the CSRA. The notice published in the New York State Register on January 19, 2005 in support of the regulatory amendment indicates that "The purpose of the proposed regulatory amendment is ….to clarify that in determining Medicaid eligibility for an institutionalized spouse, a community spouse's pension fund or IRA is a countable resource."

(2) The Office of Medicaid Management issued GIS 06 MA/004 on January 12, 2006 to inform local social services districts of the amendment to the regulations at §460-4.10(a)(9). The memorandum states that if the community spouse is **NOT** receiving periodic payments from his/her available retirement fund, the fund is considered a countable resource for purposes of determining the CSRA and the institutionalized spouse's Medicaid eligibility. See also, MRG at 316-317. Thus, the

GIS implies that if the community spouse ***is*** receiving periodic payments from his or her retirement accounts, the accounts should not be counted towards the CSRA or in determining eligibility of the institutionalized spouse.

(3) Some commentators believe that the community spouse's IRA should be totally exempt and should not be applied to the CSRA based upon the argument that the methodology used in determining Medicaid eligibility cannot be any more restrictive than the methodology used under the federal Supplemental Security Income ("SSI") program. The GIS Memorandum and revised regulations appear to violate the specific provisions of the POMS at 01.120.210 that the retirement funds of a non-applying spouse or parent are to be excluded from the deeming process. Compare Keip v. Wisconsin Dept. of Health & Family Services, 232 Wis.2d 380 (Ct. of App. Wisconsin 1998) with Mistrick v. Division of Med. Assistance & Health Services, 154 N.J. 158 (Sup. Ct. NJ 1998).

(4) **Practice Tip**: If the CS will find it difficult to meet anticipated expenses from his/her assets and income, he or she should consider whether it is advisable to liquidate the otherwise exempt retirement assets of the institutionalized spouse/Medicaid applicant prior to submitting the Medicaid application (taking into account the income tax consequences of such distribution) and to transfer the funds to the community spouse.

(B) **Income** – Any amounts paid to the community spouse are considered income to the spouse and countable in determining whether the community spouse has income in excess of the Minimum Monthly Maintenance Needs Allowance. 18 N.Y.C.R.R. §360-4.6(b)(2)(iii).

(1) In Matter of Elizabeth , FH # 4008047R (Onondaga County February 26, 2004) the spouse of the Medicaid applicant requested a hearing to request an enhanced CSRA. The spouse was taking required minimum distributions from his retirement account and the county argued that he should be required to take additional distributions sufficient to bring his income up to the MMMNA. The Commissioner's designee rejected the county's argument finding: "There is no provision in the regulations which would enable the Agency to require the Appellant's husband, as a non-applying spouse, to take additional income from his IRA. " The community spouse was granted an enhanced CSRA based upon the income generated by the RMD from his retirement accounts.

(C) **Practice Tip**: If the CS is under the age of 70 ½, he or she should be counseled to take periodic distributions from a retirement account if this will protect the account from being considered an available resource for purposes of calculating whether the spouse has assets in excess of the CSRA.

III. Treatment of Annuities held in Retirement Plans Under the Deficit Reduction Act of 2006

(A) The DRA imposed strict new rules on the purchase of annuities. 42 U.S.C. §1396p(c)(1)(G) states that the purchase of an annuity will be treated as a transfer of an asset which will result in the imposition of a period of Medicaid disqualification for long term care coverage unless the annuity is 1) irrevocable and non-assignable, 2) actuarially sound and 3) provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payments. However, the statute provides an exemption from these requirements if the annuity is a qualified retirement annuity described in subsection (b) or (q) of the Internal Revenue Code or is purchased with the proceeds from an account described in subsections (a) (c) or (p) of Section 408 of the IRC or a simplified employee pension as defined in Section 408(k) of the IRC or is a Roth IRA as described in Section 408A of the Code. These requirements are repeated in O6 OMM/ADM 5 and MRG at pp 452-454. See, Matter of _____, FH # 5337190Z (Suffolk Co. December 10, 2009)

(B) The DRA also modified 42 U.S.C. §1396p(c)(1)(F) to require that the purchase of an annuity be treated as a transfer for less than fair market value unless the state is named as the first remainder beneficiary of the annuity for at least the total amount of Medical Assistance paid on behalf of the institutionalized individual. Although the other DRA provisions do not apply to annuities contained within retirement accounts, most commentators agree that this provision does apply, if the retirement account was purchased after February 8, 2006, the effective date of the DRA. Moreover, the annuity provisions are binding upon any transaction regarding an annuity in which the individual changes the course of payment from the annuity or changes the treatment of the income or the principal of the annuity. These transactions include additions of principal, elective withdrawals, requests to change the distribution of the annuity, elections to annuitize the contract and similar actions. See, 06 OMM/ADM 5. p.6. Accordingly, if the Medicaid applicant or spouse has annuitized an annuity within an IRA or other retirement account, or made changes with the payout or beneficiary at any time after February 8, 2006, the Department of Social Services has the right to assert its right to be named as remainder beneficiary.

(C) In Matter of Entz v. Reed (Index # 2009-10454 Monroe Co. Sup. Ct. March 9, 2009) an 80 year old institutionalized Medicaid applicant had a single premium annuity within her IRA. The annuity had been purchased in 2005 when the applicant had inherited her deceased spouse's IRA. The distributions from the account satisfied the Social Security life expectancy tables. The annuity did not name the state as remainder beneficiary. The court concluded that the purchase of an annuity within a retirement account cannot be treated as a transfer of assets for less than fair market value provided that the required distributions are made. There is no further requirement that the IRA owned annuity must also name the State as beneficiary. Note that the applicant in this case purchased the annuity in 2005. It is unclear whether other courts would rule in such an absolute fashion that the Medicaid program may never require that the state be named as the remainder beneficiary of an annuity held within a retirement account.

IV. ESTATE RECOVERY

(A) The NY Medicaid program limits estate recovery to assets contained in the probate estate of the Medicaid recipient. Social Services Law §369. Thus, retirement accounts which have a named beneficiary will pass outside of probate and without any claim for recovery by the Department of Social Services.

(B) **Practice Tip**: Always advise the client to check the status of beneficiary designations. The nonapplying spouse should be counseled about whether to remove the Medicaid recipient spouse as designated beneficiary of retirement accounts. The Department of Social Services will generally require a Medicaid recipient to take the elective share of the estate of a deceased spouse. If a retirement account is distributed to the institutionalized spouse as part, or all of the elective share, and the Medicaid recipient spouse names beneficiaries the account, the remainder in the account at the death of the Medicaid recipient will be passed to the designated beneficiaries with no Medicaid estate claim. The Medicaid recipient will be required to take periodic distributions from the retirement account and these distributions will be treated as income of the Medicaid recipient.

V. NAMING A TRUST AS BENEFICIARY OF A RETIREMENT ACCOUNT

Retirement accounts have become a major source of inherited assets. Retirement accounts pose special challenges in the drafting of estate plans with trusts established for beneficiaries with disabilities, or who require lifetime management of their inheritance.

(A) **Drafting the Trust to qualify as a Designated Beneficiary**: Most individuals who desire to provide a legacy for an individual with special needs will want to leave the inheritance to a trust, rather than outright to the beneficiary, both to preserve much needed government benefits and to provide for appropriate management of the funds. This creates a problem when the inherited assets consist of retirement funds as the account owner will want to preserve the ability to have the retirement account paid out over the life expectancy of the beneficiary in order to reduce the income taxes which will be payable by the trust beneficiary upon each distribution from the account. In order to do this, the trust must qualify as a "designated beneficiary" under IRS regulations. If the trust does not qualify as a designated beneficiary, or if the account owner names his or her estate as the beneficiary of the retirement account, the account must generally be paid out over five years. Thus, the income taxation of the retirement account will be substantially accelerated unless the trust qualifies as a 'designated beneficiary."

Although the general rule is that a designated beneficiary must be an individual, the Treasury regulations at §1.401(a)(9)-4,A-5(b) permit a trust to qualify as a designated beneficiary if the Trust passes a five-pronged test:

1. The Trust must be valid under state law;

2. The Trust must be irrevocable or by its terms become irrevocable upon the death of the account owner;
3. The beneficiaries of the Trust must be identifiable from the Trust's terms;
4. Certain documentation must be provided to the Plan Administrator by October 31st of the year after the year of the participant's death, and
5. All Trust beneficiaries must be individuals.

A "conduit" trust requires that the trustee distribute the required minimum distribution of the retirement account to the beneficiary each year. The Trust beneficiary of a conduit trust will always qualify as the designated beneficiary. However, a conduit trust is rarely appropriate for a beneficiary with special needs as the required distributions from the trust must be distributed outright to the trust beneficiary and will disqualify the trust beneficiary from receipt of means-tested government benefits. Moreover, in most instances, the account participant will not want to the beneficiary to receive a mandatory distribution of cash from the retirement account. Instead, the trust should be drafted to permit the trustee to accumulate the required minimum distributions from the trust.

If an accumulation Trust satisfies all five prongs of the test, then the Trust beneficiaries will be deemed the designated beneficiaries of the Trust. The life expectancy of the OLDEST trust beneficiary will be used to determine the applicable length of the distribution period. Remainder and contingent remainder beneficiaries will all be reviewed in determining who is the oldest beneficiary of the trust.

Be Careful of Charitable Remaindermen: Individuals who have children with special needs often make provisions for charitable organizations that have provided services to the child to be remainder beneficiaries of the supplemental needs trust. However, naming a charitable remainder beneficiary of a retirement account which is distributed to a supplemental needs trust will cause the trust to fail the fifth prong of the designated beneficiary test, as a charitable organization is not an individual.

The following is sample language which can be added to a testamentary or intervivos trust to require the trustee of the supplemental needs trust to establish separate trusts for retirement benefits and to eliminate charitable organizations and individuals who are more than ten years older than the trust beneficiary from being remaindermen of these trusts. This language will assure that the trust qualifies as a designated beneficiary and that an appropriate distribution period will be used for distribution of the retirement account to the trust.

SAMPLE LANGUAGE REGARDING TRUST NAMED AS BENEFICIARY OF RETIREMENT ACCOUNT

(A) Notwithstanding any provision contained in this Trust agreement to the contrary, if at any time any portion of a trust or separate trust hereunder (the "original trust") is a beneficiary of, or consists of or receives payments from any "individual

retirement account", "qualified retirement plan" or similar tax-deferred retirement arrangement or annuity (hereinafter, "Retirement Plan"), then the trustees shall divide the trust into two separate trusts of equal or unequal value such that the assets of one trust will consist entirely of the non-Retirement Plan assets, and the second trust will consist solely and entirely of the Retirement Plan assets, and if there is more than one Retirement Plan, there shall be an additional separate trust created for each such Retirement Plan, and the trustees shall hold and administer the same in all respects as separate trust funds, upon the same terms and provisions as the original trust; provided, however, notwithstanding any provisions of the original trust, as of the date of Grantor's death, any person who would be a remainder or contingent beneficiary of such trust or portion and who would be counted as a beneficiary for purposes of Treasury Regulation Section 401(a)(9)-5, A-7, shall not be a contingent or remainder beneficiary of such trust or portion if his or her age is ten (10)[1] or more years older than the age of the individual who is the primary or income beneficiary of such trust or portion at the time of Grantor's death, and any such older contingent or remainder beneficiary shall be treated, solely for purposes of the separate trust or portion which is the beneficiary of a Retirement Plan, as if he or she predeceased Grantor. In addition, if a charitable organization which is a remainder or contingent beneficiary would be considered a beneficiary of such trust or portion for purposes of Treasury Regulation Section 401(a)(9)-5, A-7, then such charitable organization shall be treated, solely for purposes of the separate trust or portion which is the beneficiary of a Retirement Plan, as if such organization was not in existence at Grantor's death.

(B) The trustees must withdraw from such Retirement Plan, in each calendar year, and deposit into the Trust, the minimum distribution amount which is required to be withdrawn from such share under Section 401(a)(9) of the Internal Revenue Code, or other comparable Internal Revenue Code provisions or other applicable law. The trustees are authorized to elect the manner of payment from the Retirement Plan and to extend the pay-out period for as long as possible. However, this paragraph shall not be deemed to limit the absolute discretion of the trustees to withdraw from such Retirement Plan in any year more than the minimum distribution amount.

[1] Depending upon individual circumstances, the ten year age restriction may be changed at the discretion of the client or the drafting attorney.

Attachments to Materials:

1. **18 N.Y.C.R.R. §360-4.6**
2. **Excerpt from Medicaid Reference Guide (MRG) pp. 316-317 Retirement Funds**
3. **Excerpt from MRG p. 391 Medicaid Buy-in Program for Working People with Disabilities**
4. **GIS 98 MA-024-Retirement Funds owned by Medicaid Applicants/Recipients**
5. **Excerpt from POMS: SI 01120.210 Retirement Funds**
6. **Matter of Arnold S., FH # 3701203H**
7. **N.Y. State Letter to Monroe County DSS re decision in Arnold S.**
8. **Matter of Kern, FH #3873663J**
9. **Matter of Elizabeth, FH # 4008047R**
10. **18 NYCRR §360-4.10(a)(9)**
11. **GIS 06 MA/004 Treatment of Community Spouse's Retirement Funds**
12. **NYS Register/January 19, 2005**
13. **Excerpt IRS Publication 590 regarding calculation of required minimum distributions**
14. **IRS Uniform Lifetime Table for calculation of RMD**
15. **GIS 12 MA/025 and most recent Social Services life expectancy table**
16. **Memo from Oneida Co. Department of Social Services dated 4/17/2012**
17. **Excerpt from Medicaid Reference Guide (MRG) pp. 452-454; Transfer of Assets-Annuities.**
18. **Matter of the Appeal of _____, FH # 5337190Z**
19. **Entz v. Reed, Index No. 2009-10454 (Sup. Ct. Monroe Co. March 9, 2009)**

Effective Date: 08/28/2002
Title: Section 360-4.6 - Net available income and resources.

Sec. 360-4.6 Net available income and resources. Not all of the income and resources available to an applicant/recipient is counted in determining his/her financial eligibility for MA. Certain types and amounts of income and resources are disregarded. After these disregards have been applied, what remains is the applicant's/recipient's net available income and resources. This section lists the types and amounts of income and resource disregards. .....

(b) Resource disregards. (1) Burial funds of MA applicants/recipients and their families will be disregarded as follows: .....

(2) For MA applicants/recipients who are 65 years of age or older, certified blind, or certified disabled, the following additional resources will be disregarded: .....

(iii) on or after September 1, 1987, pension funds belonging to an ineligible or nonapplying legally responsible relative which are held in individual retirement accounts or in work-related pension plans, including plans for self-employed individuals such as Keogh plans. However, amounts disbursed from a pension fund to a pensioner are income to the pensioner which will be considered in the deeming process;

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Description: Retirement funds are annuities or work-related plans for providing income when employment ends. They include but are not limited to: pensions; Individual Retirement Accounts (IRAs); 401(k) plans; and Keogh plans.

Policy: A retirement fund owned by an SSI-related individual is a countable resource if the SSI-related individual is not entitled to periodic payments, but is allowed to withdraw any of the funds. The value of the resource is the amount of money that s/he can currently withdraw. If there is a penalty for early withdrawal, the value of the resource is the amount available after the penalty deduction. Any ordinary income taxes due are not deductible in determining the value of the resources.

References:

Dept. Reg.	360-4.4 360-4.6(b)(2)(iii) 366 366-ee
ADMs	11 OHIP/ADM-07 10 OHIP/ADM-01 90 ADM-36 88 ADM-30
GISs	09 MA/027 06 MA/004 98 MA/024

Interpretation: A retirement fund is not a countable resource if an individual must terminate employment in order to obtain any payment. If the SSI-related individual is in receipt of or has elected to receive periodic payments, the retirement fund is not a countable resource. Effective October 1, 2011 retirement funds of a participating MBI-WPD A/R or his/her spouse are disregarded.

NOTE: That the SSI-related individual may choose to take money out of a retirement account on a non uniform and/or inconsistent basis. An example would be an individual electing to withdraw $350 from a retirement fund in February and $600 in October. These irregular withdrawals are not treated as periodic payments. The non-periodic distributions are considered a conversion of a resource and not countable income. In this situation, the retirement fund is treated as an available, countable resource.

Effective January 1, 2006, if a Community Spouse (CS) is NOT

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receiving periodic payments from his/her available retirement fund, the fund is considered a countable resource for purposes of determining the community spouse resource allowance (CSRA) and the institutionalized spouse's Medicaid eligibility. This includes situations where the retirement fund of the CS exceeds the CSRA.

Medicaid applicants/recipients who are eligible for periodic retirement benefits must apply for such maximized benefits as a condition of eligibility. If individual does not choose to apply for available periodic benefits, the LDSS can deny/discontinue Medicaid based on the failure to pursue potential income that may be available.

Verify Status:

(a) When A/R declares a retirement account;

(b) When A/R is receiving retirement income;

(c) When A/R indicates past employment with an employer that is likely to have provided a retirement plan.

Verification:

(a) Seeing current statements from the employer, mutual fund, insurance company, or bank where the fund is deposited;

(b) If a retirement fund is invested in bonds and stock certificates, the current market value may be verified by a stock broker or newspaper.

Documentation:

(a) current information including names of funds, banks and/or companies controlling funds;

(b) names of stocks and/or bonds, issuer's name, date issued, date of maturity if applicable;

(c) account numbers;

(d) name of owner; and

(e) current value.

RESOURCES

MEDICAID BUY-IN PROGRAM FOR WORKING PEOPLE WITH DISABILITIES (MBI-WPD)

Policy:

SSI-related budgeting, including disregards and deeming, is used for determining countable resources. (See **RESOURCES** SSI-RELATED RESOURCE DISREGARDS, **RESOURCES** TIME LIMITED SSI-RELATED RESOURCE DISREGARDS and **RESOURCES** SSI-RELATED DEEMING OF RESOURCES)

To be eligible for the MBI-WPD program, effective October 1, 2011, the A/R may have countable resources equal to or less than $20,000 for a one-person household and $30,000 for a two-person household. (See **REFERENCE** MEDICAID RESOURCE LEVELS)

Effective October 1, 2011 monies in a retirement account of the MBI-WPD A/R are disregarded. (See **RESOURCES** RETIREMENT FUNDS)

See **CATEGORICAL FACTORS** MEDICAID BUY-IN FOR WORKING PEOPLE WITH DISABILITIES, **INCOME** MEDICAID BUY-IN FOR WORKING PEOPLE WITH DISABILITIES, and **OTHER ELIGIBILITY REQUIREMENTS** MEDICAID BUY-IN FOR WORKING PEOPLE WITH DISABILITIES for a discussion of other eligibility criteria for MBI-WPD.

Reference:

SSL Sect. 366(1)(a)(12)&(13)

ADMs
11 OHIP/ADM-07
04 OMM/ADM-5
03 OMM/ADM-4

GIS
08 MA/013
98 MA/024

GIS 98 MA/024

TO: Local District Commissioners, Medicaid Directors

FROM: Betty Rice, Director
Division of Consumer and Local District Relations

SUBJECT: Retirement Funds owned by Medicaid Applicants/Recipients

EFFECTIVE DATE: Immediately

CONTACT PERSON: Wendy Butz (518) 473-5500 or Dennis Boucher (518) 473-6111

This message is to clarify the Department's policy concerning the treatment of retirement funds for purposes of determining Medicaid eligibility. The clarification reflects the eligibility requirements of the Supplemental Security Income (SSI) program, however, the clarification applies to all Medicaid applicants/recipients.

Retirement funds are annuities or work-related plans for providing income when employment ends (e.g., pension, disability, or other retirement plans administered by an employer or union). Other examples are funds held in an individual retirement account (IRA) and plans for self employed individuals, sometimes referred to as Keogh plans.

Treatment as a Resource

A retirement fund owned by an individual is a countable resource if the individual is not entitled to periodic payments, but is allowed to withdraw any of the funds. The value of the resource is the amount of money that the individual can currently withdraw. If there is a penalty for early withdrawal, the value of the resource is the amount available after the penalty deduction. Any income taxes due are not deductible in determining the resource's value.

As advised in 90 ADM-36, retirement funds owned by an ineligible or non-applying community spouse are countable for purposes of determining the total combined countable resources of the couple. However, the retirement funds are not considered available to the institutionalized spouse. The retirement fund owned by the community spouse is counted first toward the maximum community spouse resource allowance.

Periodic Payments

Medicaid A/Rs who are eligible for periodic retirement benefits must apply for such benefits as a condition of eligibility. If there are a variety of payment options, the individual must choose the maximum income payment that could be made available over the individual's life time. (By federal law, if the Medicaid A/R has a spouse, the maximum income payment option for a married individual will usually be less than the maximum income payment option that is available to a single individual.) Once an individual is receiving periodic payments, the payments are counted as unearned income on a monthly basis, regardless of the actual frequency of the payment. For example, if the periodic benefit is received once a year, the amount is to be divided by twelve to arrive at a monthly income amount.

Once an individual is in receipt of or has applied for periodic payments, the principal in the retirement fund is not a countable resource. This includes situations where a Medicaid applicant has already elected less than the maximum periodic payment amount and this election is irrevocable. In such situations, only the periodic payment amount received is counted as income and the principal is disregarded as a resource.

NOTE: Individuals who have met the minimum benefit duration requirement of a New York State Partnership for Long Term Care policy are not required to maximize income from a retirement fund. In addition, non-applying or ineligible spouses/parents cannot be required to maximize income from a retirement fund.

The above information will be contained in a forthcoming administrative directive.

Effective Dates: 01/30/1998 - Present
TN 29 (07-90)

SI 01120.210 Retirement Funds

A. DEFINITIONS

1. Retirement Funds

Retirement funds are annuities or work- related plans for providing income when employment ends (e.g., pension,disability, or retirement plans administered by an employer or union). Other examples are funds held in an individual retirement account (IRA) and plans for self-employed individuals, sometimes referred to as Keogh plans. Also, depending on the requirements established by the employer, some profit sharing plans may qualify as retirement funds.

2. Periodic Retirement Benefits

Periodic retirement benefits are payments made to an individual at some regular interval (e.g., monthly) and which result from entitlement under a retirement fund.

3. Value of a Retirement Fund

The value of a retirement fund is the amount of money that an individual can currently withdraw from the fund. If there is a penalty for early withdrawal, the fund's value is the amount available to an individual after penalty deduction. However, any taxes due are not deductible in determining the fund's value.

B. POLICY PRINCIPLE

A retirement fund owned by an eligible individual is a resource if he/she has the option of withdrawing a lump sum even though he/she is not eligible for periodic payments. However, if the individual is eligible for periodic payments, the fund may not be a countable resource. See E.1. below if an individual is eligible for periodic payments.

A previously unavailable retirement fund is not income to its recipient when the fund becomes available. The fund is subject to resources counting rules in the month following the month in which it first becomes available.

C. OPERATING POLICIES

1. Termination of Employment

A retirement fund is not a resource if an individual must terminate employment in order to obtain any payment.

2. Fund Not Immediately Available

A resources determination for the month following that in which a retirement fund becomes available for withdrawal must include the fund's value. A delay in payment for reasons beyond the individual's control (e.g., an organization's processing time) does not mean that the fund is not a resource since the individual is legally able to obtain the money. It is a nonliquid resource.

3. Claim For Periodic Payment Denied

If an individual receives a denial on a claim for periodic retirement payments but can withdraw the funds in a lump sum,include the fund's lump sum value in the resources determination for the month following that in which the individual receives the denial notice.

D. DEVELOPMENT AND DOCUMENTATION

1. Evidence

If an individual has a retirement fund,determine and document whether he/she is eligible for periodic payments per SI 00510.001 ff. If not, determine and document whether he/she can make a lump-sum withdrawal.

2. Determination

If the individual can withdraw any of the retirement fund, it is a resource in the amount that is currently available.

E. RELATED POLICIES

1. Filing For Other Benefits

If an individual is eligible for periodic retirement benefits, he/she must apply for those benefits to be eligible for SSI. If he/she has a choice between periodic benefits and a lump sum, he/she must choose the periodic benefits. See SI 00510.001. and SI 00510.015.

2. Nonliquid Resource

Absent evidence to the contrary, assume that resources in the form of retirement funds are nonliquid (SI 01110.300 B.).

3. Conditional Benefits

An individual with excess nonliquid resources, such as retirement funds, may qualify for conditional benefits while awaiting payment (SI 01150.200 ff.).

4. Deeming Exclusion

If an ineligible spouse, parent, or spouse of parent owns a retirement fund,we exclude it from the deeming process (SI 01330.120 and 01330.220). See SI 00830.500 regarding the treatment of interest income.

F. EXAMPLE

1. Situation

Jeff Grant currently works 3 days a week for a company where he has been employed full-time for 20 years. Under his employer's pension plan, Mr. Grant has a $4,000 retirement fund. The CR confirms that Mr. Grant could withdraw the funds now, but there would be a penalty for early withdrawal and he would forfeit eligibility for an annuity when he stopped working.

2. Analysis

Since Mr. Grant can withdraw the retirement funds without terminating employment, they are a resource in the amount available after penalty deduction. This is true despite the fact Mr. Grant forfeits eligibility for periodic annuity payments in the future. Since SSI is a current needs program, all sources of available support (unless otherwise excluded) are considered in determining eligibility.

SI 01120.210 - Retirement Funds - 01/30/1998
Batch run: 01/27/2009
Rev:01/30/1998

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST April 9, 2002
CASE # MA0582300
CENTER # Monroe
FH # 3701203B

In the Matter of the Appeal of

~~RE~~ ARNOLD. S.

DECISION
AFTER
FAIR
HEARING

from a determination by the Monroe County
Department of Social Services

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on May 1, 2002, in Monroe County, before Katharine Volk, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

Mrs. S, Appellant's spouse; Rene Reixach, Esq., Woods, Oviatt, and Gilman; Ms. Propseri, paralegal

For the Social Services Agency

Richard Marchese, Esq. Deputy County Atty; Craig Roth, Senior legal Assistant

ISSUE

Was the Agency's determination to deny the Appellant's application for Medical Assistance on the ground that the Appellant's household has excess resources correct?

FACT FINDING

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. On January 11, 2002, an application for Medical Assistance ("Medicaid") was submitted to the Agency on behalf of the Appellant.

2. The Appellant, age 77 is currently residing in a Residential Health Care Facility; the Appellant's wife, age 77, continues to reside in the community.

3. By CNS Notice dated March 29, 2002, the Agency informed the Appellant of its determination to deny the Appellant's Medical Assistance application on the grounds that the Appellant's household has resources in excess of the allowable Medical Assistance standard.

4. The Agency calculated the household's excess resources as follows:

Non-Exempt Resources		Equity Value
Key Bank	Joint	$ 1685.86
Key Bank	Wife	$10053.04
McDonald Investments	Wife	$24804.15
ING	Wife	$ 1268.27
Nationwide	Wife	$ 844.97
NY Life	Wife	$ 8128.43
XXX Sandori Circle	exempt	$ 00.00
ManuLife Annuity/IRA	Wife	$44760.40
Allstate Annuity/IRA	Appellant	$55791.04
	TOTAL	$147,336.16
Community Spouse Resource Allowance		$ 89,820.00
(Resources owed by the Spouse		$ 89,859.26)
Resources available to Appellant ($147,336.16 - $89,820.00)		$ 57,516.16
Resource limit		$ 3,800.00
EXCESS RESOURCES		$ 53,716.16

5. The Appellant is the owner of an AIM lifetime Plus Variable Annuity/IRA, with a value of $55,791.04 as September 21, 2001.

6. The Appellant has been taking periodic payments from his IRA at the rate of $600 monthly.

7. The Appellant's wife is the owner of a ManuLife Annuity/IRA, with value of $44,760; Appellant's spouse has been taking periodic payments from her IRA at the rate of $500.00.

8. On April 9, 2002, the Appellant requested this fair hearing.

APPLICABLE LAW

GENERAL INFORMATION SYSTEM
GIS 98 MA/024

This message is to clarify the Department's policy concerning the treatment of retirement funds for purposes of determining Medicaid eligibility. The clarification reflects the eligibility requirements of the Supplemental Security Income (SSI) program, however, the clarification applies to all Medicaid applicants/recipients.

Retirement funds are annuities or work-related plans for providing income when employment ends (e.g., pension, disability, or other retirement plans administered by an employer or union). Other examples are funds held in an individual retirement account (IRA) and plans for self employed individuals, sometimes referred to as Keogh plans.

Treatment as a Resource

A retirement fund owned by an individual is a countable resource if the individual is not entitled to periodic payments, but is allowed to withdraw any of the funds. The value of the resource is the amount of money that the individual can currently withdraw. If there is a penalty for early withdrawal, the value of the resource is the amount available after the penalty deduction. Any income taxes due are not deductible in determining the resource's value.

As advised in 90 ADM-36, retirement funds owned by an ineligible or non-applying community spouse are countable for purposes of determining the total combined countable resources of the couple. However, the retirement funds are not considered available to the institutionalized spouse. The retirement fund owned by the community spouse is counted first toward the maximum community spouse resource allowance.

Periodic Payments

Medicaid A/Rs who are eligible for periodic retirement benefits must apply for such benefits as a condition of eligibility. If there are a variety of payment options, the individual must choose the maximum income payment that could be made available over the individual's life time. (By federal law, if the Medicaid A/R has a spouse, the maximum income payment option for a married individual will usually be less than the maximum income payment option that is available to a single individual.) Once an individual is receiving periodic payments, the payments are counted as unearned income on a monthly basis, regardless of the actual frequency of the payment. For example, if the periodic benefit is received once a year, the amount is to be divided by twelve to arrive at a monthly income amount.

Once an individual is in receipt of or has applied for periodic payments, the principal in the retirement fund is not a countable resource. This includes situations where a Medicaid applicant has already elected less than the maximum periodic payment amount and this election is irrevocable. In such situations, only the periodic payment amount received is counted as income and the principal is disregarded as a resource.

NOTE: Individuals who have met the minimum benefit duration requirement of a New York State Partnership for Long Term Care policy are not required to maximize income from a retirement fund. In addition, non-applying or ineligible spouses/parents cannot be required to maximize income from a retirement fund.

DISCUSSION

The Agency determined to deny the Appellant's application for medical assistance on the grounds that he had excess resources; included in such resources are two IRA's; one owned by the Appellant and one owned by the Appellant's spouse.

The issue in dispute is the Agency's treatment of the couple's two annuities/IRAs.

The Agency argues that the husband's IRA is an available resource in accordance with 18 NYCRR 360-4.4, 88 ADM 30 and under the Medical Reference Guide (MRG) at pages 257. The Agency reasons that since the Appellant is

allowed to withdraw any or all of the funds in the IRA, the IRA is a countable resource, despite the fact that that Appellant has elected to receive monthly payments. The Agency argues that the ability to access the funds in the IRA supersedes his election to receive monthly payments from this fund. The Agency notes that Appellant's election to receive $600 monthly is not irrevocable. The Agency asserts that the Appellant is required to pursue all available resources.

The Appellant's attorney argues that the Appellant's IRA and his wife's IRA are not a countable resource as the IRAs are exempt because they are in periodic payment status. The Appellant's attorney points out that Appellant is 77 years old and thus under the Internal Revenue Code, he is in required minimum distribution status, and that Appellant's monthly payment of $600 significantly exceeds the minimum distribution amount. Similarly, the Appellant's wife is 77 years old and is in required minimum distribution status, and that the wife's monthly payment of $500 significantly exceeds the minimum distribution amount.

The Appellant's attorney argues that under the Medical Reference Guide at pages 257 - 258, as well as set forth under GIS 98 MA 024 , once an individual is in receipt of or has applied for periodic payments, the retirement fund is not a countable resource.

The Appellant's attorney notes that the Agency's argument finds some authority under the "old" Medical Assistance Reference Guide (MARG) at pages 249 -250, which policy did not make an exception for exempting retirement plans which were in periodic payment status; the Appellant's attorney notes however that under the current revised Medical Reference Guide (MRG) and consistent with current SSI regulations, and as set forth in the GIS, where a retirement account is in periodic payment status, the principal is not a countable resource.

Alternatively, the Appellant's attorney argues that in the event the husband's IRA is found to be a resource, the entire amount of the Spinell's combined resources should be exempt by increasing the Community Spouse Resource Allowance needed to generate sufficient income to bring the community spouse's income closer to the Minimum Monthly Maintenance Needs Allowance (MMMNA).

The Agency's determination to include the Appellant's IRA and the wife's IRA as countable resources is not correct is and reversed.

The Department's policy clearly states that a retirement fund owned by an individual is a countable resource if the individual is not entitled to periodic payments but is allowed to withdraw any of the funds. If an individual is in receipt or has elected to receive periodic payments, the retirement fund is not a countable resource. The Agency's treatment of retirement funds was most recently clarified under the GIS 98 MA 024.

The uncontroverted evidence establishes that the two IRAs are in periodic payment status; as such the IRAs are not a countable resource. While an applicant has the duty to pursue all resources, before such duty is imposed, the resource must be in existence. Here, the IRAs are already in periodic payment status, and thus are not countable resources.

The Agency's reliance upon 88 ADM 30 is not persuasive, given that this administrative directive referenced the old MARG at pages 247 - 249; 88 ADM

30, did not address retirement funds which were in periodic payment status. The revised MRG clearly states that if an individual is in receipt or has elected to receive periodic payments, the retirement fund is not a countable resource.

In light of the above determination, it is not necessary to address the Appellant's alternative argument, seeking to increase the CSRA to the full amount of the couple's resources in order to generate enough income to meet the MMMNA.

DECISION AND ORDER

The Agency's determination to deny the Appellant's application for Medical Assistance on the grounds that the Appellant's household has resources in excess of the allowable Medical Assistance standard was not correct and is reversed.

1. The Agency is directed to redetermine the Appellant's eligibility for Medical Assistance consistent with the above determination, and to advise the Appellant in writing as to its determination.

Should the Agency need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant promptly in writing as to what documentation is needed. If such information is required, the Appellant must provide it to the Agency promptly to facilitate such compliance.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
May 28, 2002

NEW YORK STATE DEPARTMENT
OF HEALTH

By

Commissioner's Designee

Elder Law Section

NEW YORK STATE
George E. Pataki OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE Brian J. Wing
Governor 40 NORTH PEARL STREET *Commissioner*
ALBANY, NEW YORK 12243-0001

(518) 473-4968

June 20, 2002

Richard A. Marchese, Jr.
Deputy County Attorney
Monroe County Department of Social Services
39 West Main Street, Room 307
Rochester, New York 14614

Re: Arnold S
F.H. #3701203H

Dear Mr. Marchese:

This is in response to your June 3, 2002 letter requesting that we review the fair hearing record and the decision of May 28, 2992, which reversed the March 29, 2002 determination of the Monroe County Department of Social Services to deny the appellant's application for medical assistance on the grounds that the appellant's household has excess resources.

In your letter, you contend that decision is incorrect as a matter of law.

Based on our review of your letter and the appellant's representative's response, together with the fair hearing record, we have determined that the decision is correct. At issue was the treatment of an IRA owned by the institutionalized spouse, who was in receipt of monthly periodic payments from the IRA at the time of application. The decision properly reversed the agency's determination that the IRA was an available resource.

In accordance with GIS 98 MA/024, once an individual has applied for or is in receipt of peri-odic payments, the principal in an IRA is not a countable resource. While you are correct that the IRA election could be revoked and the appellant, in this case, could withdraw the entire principal of the IRA (with penalty), this argument was raised at the hearing and does not change the final determination. The Medicaid policy does not distinguish between revocable and irrevocable elections. Once the election to receive periodic payments is made, the IRA is budgeted as income, not as a resource.

We trust this addresses the issue raised in your letter and clarifies the basis for our decision in this matter.

Sincerely

Philip Nostramo
Principal Administrative Law Judge

cc: Rene' H. Reixach, Esq.

Back

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: March 7, 2003
CASE NO: MA0802462
CENTER : Monroe
FH No. : 3873663J

In the Matter of the Appeal of

Kern

from a determination by the Monroe County Department of Social Services

: DECISION
: AFTER
: FAIR
: HEARING

JURIDICTION

Pursuant to Section 22 of the New York State Social Services Law (herinafter referred to as "the Social Services Law") and Part 358 of Title 18 of the New York Code of Rules and Regulations (18 NYCRR, hereinafter referred to as "the Regulations"), a Fair Hearing was held on May 19, 2003, in Rochester, New York, before Administrative Law Judge Snitzer. The following persons appeared:

For the Appellant

Lisa Powers, the Appellant's attorney

For the Monroe County Department of Social Services (herein referred to as "the Agency")

Richard Marchese, an Agency attorney
Craig Roth, Associate Legal Assistant

ISSUE

Was a determination to deny the Appellant's September 23, 2002 application for Medical Assistance, based on his failure to maximize his available income from a retirement account, correct?

FACT FINDINGS

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. On September 23, 2002, an application for Medical Assistance was submitted to the Agency on behalf of the Appellant, seeking coverage for the costs of his necessary chronic (institutional) care and service.

   a. The Appellant is residing in a Residential Health Care Facility ("RHCF"), having been admitted in December 2001, following a period of hospitalization.

2. On January 30, 2003, the Agency determined to deny the Appellant's

September 23, 2002 application. The reason given for that action was expressed as failure to "maximize Donald's American Express IRA Plan per the life expectancy tables, as requested 11/26/02 and 1/6/03."

a. The Appellant, age 78 at the date of application, has an Individual Retire Account (CESA) (herein referred to as "the IRA). As of September 25, 2002, the IRA had a Net Asset Value ("NAV") of $202,076.78.

   * At this hearing, however, the representatives of the parties stipulated that the amount to be considered should be the NAV as of September 1, 2002, that being the date of assessment of the Appellant's financial circumstances, and agreed that documentation of that amount would be obtained, and when available, would replace the September 25, 2002 statement.

b. The Appellant is married; his wife, 73 years of age at the date of application, continues to reside in her community.

c. In 1995, the Appellant elected to commence a regular monthly plan of withdrawal from his IRA; currently, the withdrawals from said account are at the rate of $915 per month, equivalent to $10,980 per year, based on the "minimum pay-out" rate permissible under an actuarial table used by the federal Internal Revenue Service. The Appellant's IRA provides that monthly withdrawals shall continue for the life of the Appellant, then continue for his wife, his designated beneficiary.

d. On November 26, 2002, the Agency made a written request to the Appellant's counsel to have the Appellant's IRA withdrawals increased to an amount shown in an actuarial table requiring full withdrawal within 7.83 years, or at the rate of $2,150.67, equivalent to $25,808.04 per year.

e. Although that request was repeated in writing on January 6, 2003, neither the Appellant nor anyone acting on his behalf has taken any action to comply with that request, disputing the request and contending that the Appellant has the right to maintain his previous rate of withdrawal ("pay-out"), one scheduled to continue over a span of life expectancy of 19.2 years.

3. On March 7, 2003, a request for a Fair Hearing was made on behalf of the Appellant, seeking review of the Agency's determination to deny the September 23, 2002 application.

APPLICABLE LAW & POLICY

Sections 360-4.1 of the Regulations describes the process by which all applications for Medical Assistance will be evaluated, indicating that all income and resources available to an applicant/recipient during the period for which eligibility is being determined will be determined. Certain amounts and types of income and resources will be disregarded; the remainder is the applicant's/recipient's net available income and resources.

Section 360-4.3 of the Regulations more specifically describes "Available Income", to include all earned and unearned income received, most types of "in kind" income, and income deemed available from other sources, (including legally-responsible relatives).

Section 360-4.10 of the Regulations provides for the Treatment of Income and Resources when a married Medicaid applicant or recipient requires institutional health care and his or her spouse continues to reside in their community. Sub-Section "B" thereof specifically pertains to the Treatment of Income in such cases.

An Administrative Directive (96 ADM 8) issued by the NYS Department of Social Services March 29, 1996 (but retroactive in effect), advised local districts of changes in the treatment of transfers and trusts in the Medical Assistance program, as a result of the federal Omnibus Budget Reconciliatin Act of 1993 ("OBRA 93"). Attached to said Directive are two Life Expectancy/Actuarial Tables (Attachment IV), one for Females, the other for Males. Said Tables are presumed to have been promulgated by the United States Department of Health & Human Services, Health Care Finance Administration (now known as the Centers for Medicare & Medicaid Services, "CMS").

A General Information System Message addressed to local social services districts (and publicly-disseminated) on August 11, 1998 (GIS 98 MA024) clarified statewide policy concerning the treatment of Retirement Funds for the puposes of determining Medicaid eligibility; said clarification reflected the eligibility requirements of the Supplemental Security Income (SSI) program; however, the clarification applies to all Medicaid applicants and recipients. Said Message described Retirement Funds as annuities or work-related plans for providing income when employment ends (e.g. pensions, disability, or other retirement plans administered by an employer or union; Individual Retirement Accounts, and plans for self-employed individuals.

More specifically, said Message further provided that Medicaid applicants/recipients who are eligible for periodic retirement benefits must apply for such benefits as a condition of eligibility. If there are a variety of payment options, the individual must choose the maximum income payment that could be made available over the individual's lifetime. (By Federal Law, if the Medicaid applicant/recipient has a spouse, the maximum income payment option for a married individual will usually be less than the maximum income payment option that is available to a single individual.) Once an individual is receiving periodic payments, the payments are counted as unearned income on a monthly bais, regardless of the actual frequency of the payment. Said Message also provides that once an individual is in receipt of, or has applied for, periodic payment, the principal in the retirement fund is not a countable resource, even if the individual has elected [to withdraw] less than the maximum periodic payment amount and this election is irrevocable.

DISCUSSION

At the outset, inquiry was made regarding the absence from the hearing of both the Appellant and his wife. Both counsel expressed their belief that, despite the general preference to have the all parties personally in attendance, neither the Appellant nor his wife is actually necessary in this

instance, because, with the exception of a relatively small discrepancy between the net asset value of the Appellant's retirement account as of September 25, 2002 and the correct net asset value as of September 1, 2002, there is no issue of fact; the hearing seeks resolution, solely, of disputes regarding matters of law.

The Agency's attorney further explained that there is no issue related to any available resource; the only issue concerns the Agency's treatment of income, the action under review being a denial of Medicaid for failure to maximize the amount of monthly payments from the Appellant's retirement account. He called attention to the Appellant's existing plan of monthly withdrawal based on a "pay-out" rate permitted by the Internal Revenue Service that the Agency believes to be substantially lower/slower than the "maximum income payment option" required under current state law and policy.

More specifically, he showed that the Agency had asked the Appellant's attorney (more than once) to have the periodic withdrawal amount increased to a rate consistent with the Life Expectancy Table found at Attachment IV of 96 ADM 8, noting that the life expectancy of a 78 year old male is 7.83 years. Assuming the retirement account balance to be what had been shown in the September 25th statement, the required increase would be from $915 to $2,150.67 per month.

The Appellant's counsel, on the other hand, contended that the increase the Agency seeks is merely suggested by the content of a GIS Message, is not mandated by any provisions of statute or regulation, and is therefore not required by unambiguous provisions having the force of law. She also argued that the longevity table attached to 96 ADM 8 was not intended to be used in the way the Agency proposes, and is included at Appendix IV solely to guide actuarial projections in evaluating a transfer of a "stream of income", as discussed at Sub-Section H(2) (top of page 18) of the Directive.

The Appellant's counsel further contended that, because the Appellant previously chose to withdraw funds at the minimim rate permitted by the IRS (withdrawals are taxable as ordinary income, under provisions of the Internal Revenue Code), the Appellant has no legal obligation to increase the payments or the rate of withdrawal. Moreover, doing so could more rapidly exhaust the balance of the retirement account, to the detriment of the Appellant's wife, who has a longer life expectancy. In advancing the Appellant's position, his counsel made no claim that the Appellant's election to take the minimum permissible rate of withdrawal was irrevocable, or that he had no authority to change the amount or rate in the manner requested by the Agency.

Review of current state law and policy fails to reveal adequate legal authority for the action under review. Although failure to apply for income or benefits an applicant has the right to receive may result in denial of a Medicaid application for failure to meet one of the conditions of eligibility, the Appellant in this case was already receiving the benefits, merely in amounts that are less than what the Agency consideres the "maximum income payment option". Under the circumstances, the determination under review cannot be affirmed.

However, to avoid further delay in completing a proper evaluation of an application made several months ago, it must also be admitted that the point made by Appellant's counsel is well taken; there is simply no current legal authority supporting the policy objective of requiring a "maximum income payment option" in cases involving a community spouse. While there is legal authority for an individual seeking Medicaid to generally be so required, there exists no legally-sanctioned longevity table for use in any case involving a couple.

DECISION AND ORDER

The determination to deny the application for Medicaid submitted on behalf of the Appellant, solely based on failure to change the amount of the retirement account withdrawals to the "maximum income payment option", is not correct, and is reversed.

* The Agency is directed to take no further action on its denial notice, and promptly complete its calculation of the Appellant's Net Available Monthly Income, including all income actually received.

* Upon completing that calculation, the Agency is required to issue a written notice to those acting on the Appellant's behalf, in the form and manner required by law, indicating the effective date of coverage, and the conditions to be met for the coverage, including the amount of the Net Available Monthly Income ("NAMI") to be applied toward the costs of the Appellant's necessary medical and institutional care.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
July 8, 2003

NEW YORK STATE DEPARTMENT OF HEALTH

By

Commissioner's Designee

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST October 31, 2003
CASE # M015836
CENTER # Onondaga
FH # 4008047R

In the Matter of the Appeal of

Elizabeth

DECISION AFTER FAIR HEARING

from a determination by the Onondaga County Department of Social Services

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on January 29, 2004, in Onondaga County, before Orrie Eihacker, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

Ami Longstreet, Attorney

For the Social Services Agency

Nancy Wentworth and Marie Gentile, Fair Hearing Representatives; Morgan Thurston, Agency Attorney

ISSUE

Was the Agency's determination that the Appellant is not eligible for Medical Assistance for her nursing home care for the period January 2003 through March 2003 due to excess resources in the amount of $18,865.45 correct?

Should an award be made increasing the Community Spouse Resource Allowance to generate additional income to bring the community spouse's income closer to the Minimum Monthly Maintenance Needs Allowance?

FACT FINDING

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant applied for Medical Assistance for her needs only, on January 30, 2003.

2. The Appellant, age 84, resides in a nursing home. She is married and her husband, age 85, resides in the community.

3. By notice dated January 28, 2004 the Agency advised the Appellant of its determination to deny her application for Medical Assistance for the months of January 2003 through March 2003 due to excess resources in the amount of $18,865.45.

4. As of a January 1, 2003 "snapshot" date, the Appellant's excess resources, allowing for a Maximum Community Spouse Resource Allowance of $74820.00 and the Medical Assistance resource limit, are $18,865.45.

5. The Appellant's gross monthly income (for 2003) consists of her Social Security retirement benefits in the amount of $522.70 and an IRA distribution of $50.49. She incurs health insurance premiums of $58.70 for Medicare Part B and $152.40 for private health insurance.

6. The Appellant's husband's gross monthly income (for 2003) consists of his Social Security retirement benefits of $1198.70, income from a trust in the amount of $246.42, interest on bank accounts in the amount of 22.61, and an IRA distribution in the amount of $72.58. He incurs health insurance premiums of $58.70 for Medicare Part B and $152.40 for private health insurance.

7. By notice dated January 20, 2004 the Agency advised the Appellant of its Intent to Establish a Liability Towards Chronic Care as of April 2003.

8. In determining the amount of the Appellant's Net Available Monthly Income, or NAMI, the Agency allocated a portion of the Appellant's income to increase the amount available to her community spouse because the income of the community spouse was less than the Minimum Monthly Maintenance Needs Allowance ("MMMNA"). The calculation as of January 2003 is as follows:

Appellant's Net Social Security	$ 464.00		
IRA distribution	$ 50.49		
Total Income		$ 514.49	
Less:			
Personal Items Allowance	50.00		
Health Insurance Premiums (Other than Medicare)	152.40		
Total Allowable Offsets		-$202.40	
Appellant's Net Available Monthly Income			$312.09
Spousal Contribution:			
Community Spouse's monthly income		$ 1340.25	
Applicable MMMNA		2267.00	
Difference		$ 926.75	
Contribution to Community Spouse required			-312.09
Balance of Appellant's Net Available Monthly Income - (NAMI)			$0.00

9. On October 31, 2003, the Appellant requested this fair hearing seeking an increase in the Community Spouse Income Allowance.

APPLICABLE LAW

Section 360-4.10 of the Regulations provides for the Treatment of Income and Resources when a married Medicaid applicant or recipient requires institutional health care and his or her spouse continues to reside in their community.

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(c) Treatment of resources. The following rules apply in determining the resources available to the institutionalized spouse and the community spouse when determining eligibility for MA for the institutionalized spouse.

(1) At any time after the commencement of a continuous period of institutionalization, either spouse may request an assessment of the total value of their resources, or may request to be notified of the amounts of the community spouse monthly income allowance, the community spouse resource allowance, and the family allowance, and/or the method of computing such amounts.

(i) Assessment. Upon receipt of a request for assessment, together with all relevant documentation of the resources of both spouses, the social services district must assess and document within thirty days the total value of the spouses' resources and provide each spouse with a copy of the assessment and the documentation upon which it was based. If the request is not part of an MA application, the social services district may charge a fee not exceeding twenty-five dollars for the assessment which is related to the cost of preparing and copying the assessment and documentation.

(ii) Determination of allowances. At the request of either spouse, the social services district must notify the requesting spouse of the amounts of the community spouse monthly income allowance, the community spouse resource allowance, and the family allowance, and/or the method of computing such amounts.

(iii) Notice of right to a fair hearing. At the time of an assessment or a determination of allowances pursuant to this paragraph, the social service district must provide to each spouse who received a copy of such assessment or determination a notice of the right to a fair hearing under section 358-3.1(g) of this Title. If the assessment or determination is made in connection with an application for MA, the fair hearing notice must be sent to both spouses at the time the eligibility determination is made. Section 358-3.1(g) of this Title provides a fair hearing right to an institutionalized spouse or community spouses, after a determination has been made on the institutionalized spouse's MA application, if the spouse is dissatisfied with the determination of the community

spouse monthly income allowance, the amount of monthly income determined to be otherwise available to the community spouse, the amount of resources attributed to the community spouse or to the institutionalized spouse, or the determination of the community spouse resource allowance.

(2) At the time of application of the institutionalized spouse for MA, all resources, including resources required to be considered in determining eligibility pursuant to section 360-4.4 of this Subpart, held by the institutionalized spouse, the community spouse, or both, will be considered available to the institutionalized spouse to the extent that the value of the resource exceeds the maximum community spouse resource allowance.

(3) In the event that a community spouse fails or refuses to cooperate in providing necessary information about his/her resources, such refusal will be a reason for denying MA for the institutionalized spouse because MA eligibility cannot be determined. However, an institutionalized spouse will not be determined ineligible for MA in this situation if: the institutionalized spouse executes an assignment of his/her right to pursue support from the community spouse in favor of the social services district and the department, or is unable to execute such an assignment due to physical or mental impairment; and to deny assistance would be an undue hardship, as defined in subdivision (a) of this section.

(4) If necessary information about the resources of the community spouse is provided, but the community spouse fails or refuses to make available his/her resources in excess of the maximum community spouse resource allowance, the institutionalized spouse will be eligible for MA only if: the institutionalized spouse is otherwise eligible; and the institutionalized spouse executes an assignment of his/her right to pursue support from the community spouse in favor of the social services district and the department, or the institutionalized spouse is unable to execute such an assignment due to physical or mental impairment. However, nothing contained in this paragraph prohibits a social services district from enforcing the provisions of the Social Services Law which require financial contributions from legally responsible relatives, or recovering from the community spouse the cost of any MA provided to the institutionalized spouse.

(5) After the month in which the institutionalized spouse has been determined eligible for MA during a continuous period of institutionalization, no resource of the community spouse will be considered available to the institutionalized spouse.

(6) Notwithstanding section 360-4.4 of this Subpart, after an institutionalized spouse is determined eligible for MA, transfers of resources by the institutionalized spouse to the community spouse will be permitted to the extent that the transfers are

solely to or for the benefit of the community spouse and do not exceed the value of the community spouse resource allowance. Such transfers must be made within 90 days of the eligibility determination or within such longer period as determined by the social services district in individual cases. Such resources must actually be transferred to or for the sole benefit of the community spouse in order to be excluded when determining the continuing eligibility of the institutionalized spouse.

(7) If either spouse establishes that income generated by the community spouse resource allowance, established by the social services district, is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, the department must establish a resource allowance adequate to provide such minimum monthly maintenance needs allowance from those resources considered to be available to the institutionalized spouse.

DISCUSSION

Neither the Appellant nor her husband appeared at the hearing. The Appellant was represented by her attorney, who waived her appearance.

The record establishes that the Appellant applied for Medical Assistance for her needs only on January 30, 2003. The Appellant is a resident of a nursing home and her husband resides in the community. The record further establishes that the Agency evaluated the resources owned by the Appellant and her husband and determined that their combined resources were $98,701.28. After deducting the Maximum Community Spouse Resource Allowance and the Medical Assistance resource limit for one person, her excess resources were $18,865.45. This computation was not disputed by the Appellant's representative at the hearing. The record further establishes that by notice dated January 28, 2004, which was presented to the Appellant's attorney at the hearing, the Agency advised the Appellant of its determination that she was not eligible for Medical Assistance for January 2003 through March 2003 due to excess resources in the amount of $18,865.45. It is noted that there had been earlier notices, one undated, one dated October 15, 2003 and one dated January 20, 2004, all with slightly different excess resource amounts. These previous notices were withdrawn by the Agency at the hearing. The record therefore establishes that the Agency's determination of January 28, 2004 to deny the Appellant's application for Medical Assistance for the months of January, February and March 2003 due to excess resources was correct when made.

However, at the hearing the Appellant's attorney contended that the Commissioner should establish a higher Community Spouse Resource Allowance in order to generate income for the Appellant's community spouse. She pointed out that the Appellant's husband's income was below the Minimum Monthly Maintenance Needs Allowance of $2267.00 per month. As computed by the Agency, his own net income was $1340.25 per month, and after adding in the Community Spouse Income Allowance of $336.78, his income comes to $1677.03 per month. The Appellant's attorney further pointed out that if interest at the rate of five percent is computed on the excess resources of

$18,865.45, the result would be additional income of only about $80.00 per month, resulting in monthly income to the Appellant's husband of approximately $1757.00. This amount is approximately $510.00 less than the MMMNA of $2267.00. She therefore requested that the Commissioner establish a higher Community Spouse Resource Allowance by including the $18,865.45.

At the hearing the Agency contended that the Commissioner had no authority to increase the Community Spouse Resource Allowance unless the community spouse established that he would experience significant financial distress with income of only $1677.00 per month. The Agency contended that the Appellant's husband is not eligible for an increased Community Spouse Resource Allowance because he has not established a need for income up to the MMMNA of $2267.00.

The Agency's contention is without merit. The regulations provide simply that if either spouse establishes that income generated by the Community Spouse Resource Allowance is inadequate to raise the community spouse's income to the MMMNA, the Commissioner must establish a Community Spouse Resource Allowance adequate to provide such MMMNA from those resources considered to be available to the institutionalized spouse. The provisions regarding significant financial distress apply only when a community spouse seeks to obtain a Community Spouse Income Allowance over and above the MMMNA. Thus, significant financial distress need not be shown when making a claim to raise the Community Spouse Resource Allowance solely to generate income up to the MMMNA.

The Agency then questioned whether the Appellant's husband has maximized his income from his IRA. The Appellant's attorney responded that he is taking the minimum required distribution amount as allowed by the IRS. The Agency then contended that the Appellant's husband should not be granted an increased Community Spouse Resource Allowance because he has not maximized his income from his IRA. As this was a new argument, raised for the first time at this fair hearing, the parties were granted additional time to submit briefs outlining their positions.

The Agency contended in its brief that the Appellant should be required to maximize her IRA distributions because Departmental Policy at GIS 98 MA/024 provides that an individual must choose the maximum payment that could be made over the individual's lifetime, based on her life expectancy. The Agency further contended that the Appellant's husband should be required to maximize his IRA distributions. The Agency admitted that GIS 98 MA/024 provides that non-applying spouses cannot be required to maximize income from a retirement fund. The Agency contended, however, that because the Appellant's husband is seeking to retain additional resources in order to generate income, that this provision should not be applied because it is not fair to allow him to claim insufficient income when at the same time he has another source of income available to him.

The Appellant's attorney contended in her brief that the Agency should not be allowed to raise the issue of the amount of income from the IRAs because the Agency had not done so in any of the numerous notices it has sent the Appellant. She agreed, however, to waive this argument if addressing it would cause further delay. As to the IRA income itself,

she contended only that the IRAs are not resources and cannot be counted as income. She did not address the issue of whether the Appellant and/or her husband should be required to take additional monthly income from their IRAs. At the hearing, however, she had pointed out that because both the Appellant and her husband are over the age of 70-1/2, the IRS requires them to take a minimum distribution from their IRA, and that this minimum is calculated based on their life expectancy. She further noted that in the case of both the Appellant and her husband, the minimum required distribution is higher than the interest generated by the IRAs, and thus their minimum required distributions consist of both interest and principal. In her brief submitted after the hearing, the Appellant's attorney also submitted verification of the two IRA accounts. As of December 2003 the Appellant's balance was $9,460.45 and her husband's balance was $13,148.67. She also submitted a copy of a Treasury Regulation and chart showing the number of years within which an IRA must be distributed at various ages, beginning at age 70. It appeared that their income distributions are based on this chart.

The Agency's contention that the Appellant has not maximized her income from her IRA cannot be upheld. While the Agency correctly contended that she must "maximize her periodic payments from her IRA based on her life expectancy", the Agency offered no evidence to show that she has not already done so. The Agency gave no explanation as to why it believed that her current distributions have not been maximized, "based on her life expectancy". It is noted that the Appellant's attorney claims that the required minimum distributions are based on life expectancy. The Agency has not refuted that position or offered any alternative test. Therefore, the Agency's contention cannot be upheld. As to the Appellant's husband's IRA income, it appeared at the hearing that the Agency was claiming that the Appellant's husband should be required to take sufficient income from his IRA to bring his income up to the MMMNA, without having to retain the excess resources. This amount would be approximately $500.00 per month. There is no provision in the regulations which would enable the Agency to require the Appellant's husband, as a non-applying spouse, to take additional income from his IRA. Accordingly, the Agency's contentions regarding the IRA income of both the Appellant and her husband cannot be upheld.

Because the record establishes that the Appellant's husband's income is below the MMMNA, an award will be made increasing the Community Spouse Resource Allowance by the excess resource amount of $18,865.45 in order to generate income to the Appellant's husband.

Finally, the Appellant's attorney contends that the Commissioner should direct the Agency to pay the Appellant's reasonable attorney's fees, on the grounds that the Agency delayed eight months in making its initial determination, and then issued additional notices, requiring additional attorney preparation time. The Appellant's attorney cites to Section 8601 (a) of the CPLR, providing for legal fees for a prevailing party "in any civil action brought against the state, unless the court finds that the position of the state is substantially justified". (Quotations from the Appellant's brief). Without reviewing whether the cited regulation applies to a county Department of Social Services, the record in this case establishes that the Agency's determination to deny the Appellant's

application for Medical Assistance for January through February 2003 was correct when made, because there was no dispute that the Appellant had excess resources, and because the Agency has no authority under the regulations to increase a Community Spouse Resource Allowance in order to generate additional income. Only the Commissioner has that authority. Given these circumstances, the Agency's denial must be found to be "substantially justified". In addition, it should be noted that this is not an action at law, but rather, an administrative proceeding. Therefore, there is no authority to grant attorney's fees.

DECISION AND ORDER

The Agency's determination that the Appellant is not eligible for Medical Assistance for her nursing home care for the period January 2003 through March 2003 due to excess resources in the amount of $18,865.45 was correct when made.

However, an award is hereby made increasing the Community Spouse Resource Allowance by $18,865.45 to generate additional income to bring the community spouse's income closer to the Minimum Monthly Maintenance Needs Allowance.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
February 26, 2004

NEW YORK STATE DEPARTMENT
OF HEALTH

By

Commissioner's Designee

Effective Date: 12/21/2005
Title: Section 360-4.10 - Treatment of income and resources of institutionalized spouses

360-4.10 Treatment of income and resources of institutionalized spouses.

(a) Definitions. Notwithstanding any regulations to the contrary, when used in this section, unless the context clearly requires otherwise: ...

(9) Resources do not include those disregarded or exempt under sections 360-4.4(d), 360-4.6(b) and 360-4.7(a) of this Subpart, except that pension funds belonging to a community spouse which are held in individual retirement accounts or in work-related pension plans, including plans for self-employed individuals such as Keogh plans, are countable resources of the community spouse for purposes of determining the institutionalized spouse's eligibility and calculating the amount of any community spouse resource allowance.

TO: Local District Commissioners, Medicaid Directors

FROM: Betty Rice, Director
Division of Consumer & Local District Relations

SUBJECT: Treatment of Community Spouses' Retirement Funds

EFFECTIVE DATE: January 1, 2006

CONTACT PERSON: Local District Liaison
Upstate (518)474-8887 NYC (212)417-4500

This GIS informs districts of an amendment to Section 360-4.10(a)(9) of Department regulations, regarding the treatment of a community spouse's (CS's) retirement fund for purposes of determining an institutionalized spouse's Medicaid eligibility.

Retirement funds are annuities or work-related plans for providing income when employment ends (e.g., pension, disability, or other retirement plans administered by an employer or union). Additional examples are funds held in an individual retirement account (IRA) and plans for self-employed individuals (e.g., Keogh plans).

In accordance with recent federal notification regarding the Medicare Catastrophic Coverage Act of 1988, retirement funds are not excludable resources for purposes of determining an institutionalized spouse's Medicaid eligibility. Therefore, effective January 1, 2006, if a CS is NOT receiving periodic payments from his/her available retirement fund, the fund is considered a countable resource for purposes of determining the community spouse resource allowance (CSRA) and the institutionalized spouse's Medicaid eligibility. This includes situations where the retirement fund of the CS exceeds the CSRA. Prior to the regulation change, it had been the Department's policy to count the resource amount of any retirement fund belonging to the CS first toward the CSRA and to disregard any amount which exceeded the CSRA. The excess will no longer be disregarded.

This change applies to Medicaid eligibility determinations with a budget "From Date" of January 1, 2006 or after. Undercare cases are not affected by this change.

NOTE: If the community spouse has elected to receive periodic payments from his/her retirement account, the retirement account is not a countable resource in determining the institutionalized spouse's eligibility. However, the periodic payments are countable income for the community spouse.

For purposes of determining Medicaid eligibility for SSI-related individuals who are not subject to spousal impoverishment budgeting, a retirement fund owned by a non-applying or ineligible spouse continues to be excluded as a resource.

Social services districts will be advised of the change when the amendment becomes effective.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required. The proposed amendment would not impose any adverse impact on businesses, either large or small, nor will the proposal impose any new reporting, recordkeeping or other compliance requirements on a business.

Rural Area Flexibility Analysis

A rural flexibility analysis statement for this proposed action in not required. As mentioned in the regulatory impact statement, the proposed amendment would clarify that a community spouse's pension fund or individual retirement account is a countable resource for purposes of determining the institutionalized spouse's Medicaid eligibility. This requirement would not affect rural areas any more than non-rural areas. The proposed amendment does not impose any new reporting, recordkeeping or any other new compliance requirements on rural or non-rural areas.

Job Impact Statement

A job impact statement is not required. The proposal will not have an adverse impact on jobs and employment opportunities. The proposed rule is required to clarify the treatment of a community spouse's individual retirement account (IRA) or pension fund in the determination of an institutionalized spouse's Medicaid eligibility.

Insurance Department

EMERGENCY RULE MAKING

Valuation of Life Insurance Reserves

I.D. No. INS-03-05-00001-E
Filing No. 1497
Filing date: Dec. 29, 2004
Effective date: Dec. 29, 2004

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of Part 98 (Regulation 147) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: Earlier this year, the Department became aware that some insurers have designed certain life insurance products with the clear intent of circumventing the existing reserve standards. The Department is concerned with the solvency of those insurers who fail to set aside sufficient funds to pay claims as they pose a serious threat to consumers who rely on insurers to honor their commitment both now and in the future. In addition, insurers who have elected to circumvent the law place themselves at a competitive advantage over those insurers who follow the rules and establish the appropriate level of reserves. On a daily basis, those insurers who abide by the law suffer substantial losses in terms of market share, as they cannot effectively compete against insurers that do not set aside adequate reserves. Action must be taken now to end to this practice of under reserving by insurers that have decided market share is more important than the safety and soundness of policyholder funds.

New York authorized insurers must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the December 31, 2004 annual statement is March 1, 2005. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner.

For all of the reasons stated above, an emergency adoption of this first amendment to Regulation No. 147 is necessary for the general welfare.

Subject: Valuation of life insurance reserves.

Purpose: To prescribe rules and guidelines for valuing individual life insurance policies and certain group life insurance certificates, with primary emphasis on valuation of non-level premium and/or non-level benefit life insurance policies, indeterminate premium life insurance policies, universal life insurance policies, variable life insurance policies, and credit life insurance policies in accordance with statutory reserve formulas.

Substance of emergency rule: The First Amendment to Regulation No. 147 provides new mortality and reserve standards for credit life insurance policies. It also provides new reserve standards for certain other specified life insurance policies. The following is a summary of the amendments to Regulation No. 147:

Section 98.1(a) was amended to include credit life insurance policies and to mention clarification of principles.

Section 98.2(b) was amended to ensure consistency in applicability wording within the regulation.

Section 98.2(i) was amended to state that unless notification was previously provided to the superintendent to adopt lower reserves based on the requirements of this Part, insures may not adopt such lower reserves without the prior approval of the superintendent.

A new subdivision (j) was added to section 98.2 regarding the use of the minimum mortality standards defined in Part 100 of this Title.

A new subdivision (k) was added to section 98.2 regarding the applicability of this regulation to certain specified life insurance policies.

A new subdivision (l) was added to section 98.2 regarding the applicability of this regulation to credit life insurance.

Subdivision (d)(2) of section 98.4 was amended to change an incorrect reference.

The last sentence of section 98.4(s) was amended to change a reference from 1% to one percent, in order to be consistent with similar references in other sections of the regulation.

Section 98.4(u) was amended to reference the examples and reserve methodologies described in section 98.9 of this Part.

The third sentence of paragraph (2) of section 98.6(a) was amended to change an incorrect reference to the Contract Segmentation Method to the mortality and interest rates used in calculating basic unitary reserves.

Section 98.7(b)(1)(i) was amended to reference section 98.9 of this Part.

Section 98.7(b)(1)(ii) was amended to have the definition of secondary guarantee period extended to this whole Part rather than just paragraph (1) of section 98.7.

Section 98.7(b)(1)(iii) was amended to reference section 98.9 of this Part and provides clarification of an example supplied in this section.

Section 98.7(c) was amended to change the reference from age 100 to the age at the end of the applicable valuation mortality table, since the 2001 CSO Mortality Tables go out to ages greater than 100.

Section 98.8(b) was amended to reference section 98.9 of this Part.

A new section 98.9 was added for certain specified life insurance policies. This section provides examples of policy designs which constitute guarantees and describes the reserve methodologies to be used in valuing such policies.

A new section 98.10 was added for credit life insurance. This section provides minimum mortality standards and minimum reserve standards for such policies.

Section 98.9 was renumbered to section 98.11. This is the severability provision.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 28, 2005.

Text of emergency rule and any required statements and analyses may be obtained from: Michael Barry, Insurance Department, 25 Beaver St., New York, NY 10004, (212) 480-5265, e-mail: mbarry@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The superintendent's authority for the First Amendment of Regulation No. 147 (11 NYCRR 98) is derived from sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517 of the Insurance Law.

These sections establish the superintendent's authority to promulgate regulations governing reserve requirements for life insurers. Sections 201 and 301 of the Insurance Law authorize the superintendent to prescribe regulations accomplishing, among other concerns, interpretation of the provisions of the Insurance Law, as well as effectuating any power given to him under the provisions of the Insurance Law to prescribe forms or otherwise to make regulations.

Section 1304 of the Insurance Law enables the superintendent to require any additional reserves as necessary on account of life insurers' policies, certificates and contracts.

Section 1308 of the Insurance Law describes when reinsurance is permitted and the effect that reinsurance will have on reserves.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for this proposed action is not required. As mentioned in the regulatory impact statement, the proposed amendment would require the EPIC program to share data concerning EPIC participants enrolled in the Medicare prescription drug program with OTDA in order for those participants to receive appropriate Food Stamp benefits. This provision would not affect rural areas any more than non-rural areas. The proposed amendment does not impose any new reporting, recordkeeping or any other new compliance requirements on rural or non-rural areas.

Job Impact Statement

A Job Impact Statement is not required. The proposal will not have an adverse impact on jobs and employment opportunities. The proposed rule is required to assist EPIC participants enrolled in the Medicare prescription drug program to receive in a timely manner medical deductions, to which they are entitled, for Food Stamp eligibility purposes.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Spousal Impoverishment Budgeting

I.D. No. HLT-03-05-00032-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of section 360-4.10(a)(9) of Title 18 NYCRR.

Statutory authority: Social Services Law, section 366-c

Subject: Spousal impoverishment budgeting.

Purpose: To clarify that a community spouse's pension fund or individual retirement account (IRA) is a countable resource for purposes of determining the institutionalized spouse's Medicaid eligibility.

Text of proposed rule: Paragraph (9) of subdivision (a) of Section 360-4.10 is amended to read as follows:

(9) Resources do not include those disregarded or exempt under sections 360-4.4(d), 360-4.6(b) and 360-4.7(a) of this Subpart, *except that pension funds belonging to a community spouse which are held in individual retirement accounts or in work-related pension plans, including plans for self-employed individuals such as Keogh plans, are countable resources of the community spouse for purposes of determining the institutionalized spouse's eligibility and calculating the amount of any community spouse resource allowance.*

Text of proposed rule and any required statements and analyses may be obtained from: William Johnson, Department of Health, Division of Legal Affairs, Office of Regulatory Reform, Corning Tower, Rm. 2415, Empire State Plaza, Albany, NY 12237, (518) 473-7488, fax: (518) 486-4834, e-mail: regsqna@health.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

Statutory Authority:

Section 206(1)(f) of the Public Health Law requires the Department of Health (Department) to enforce the provisions of the medical assistance program, pursuant to titles eleven, eleven-A, and eleven-B of the Social Services Law (SSL). Section 363-a(2) of the SSL requires the Department to establish such regulations as may be necessary to implement the program of medical assistance for needy persons (Medicaid). Section 366-c(2)(d) of the SSL provides that the amount of the community spouse resource allowance budgeted for the spouse of an institutionalized Medicaid applicant will depend on the amount of resources otherwise available to such spouse. For purposes of this provision, section 366-c(2)(e) of the SSL authorizes the Commissioner of the Department to define the term "resources", consistent with federal law.

Legislative Objectives:

Section 363-a of the SSL designates the Department as the single State agency responsible for implementing the Medicaid program in this State, and requires the Department to promulgate any necessary regulations which are consistent with federal and State law. The proposed regulatory amendment is necessary to clarify that a community spouse's pension fund or individual retirement account (IRA) is a countable resource for purposes of determining the institutionalized spouse's Medicaid eligibility, and for purposes of calculating the amount of the community spouse resource allowance.

Needs and Benefits:

The purpose of the proposed regulatory amendment is to revise section 360-4.10(a)(9) of the Medicaid regulations to clarify that in determining Medicaid eligibility for an institutionalized spouse, a community spouse's pension fund or IRA is a countable resource. Federal Medicaid law at 42 U.S.C. § 1396r-5(c)(5), added by the Medicare Catastrophic Coverage Act (MCCA) of 1988, defines the term "resources" to exclude only certain resources specified in federal law. Pension funds and IRAs are not among those resources specifically excluded by the MCCA, and thus are countable for purposes of determining the Medicaid eligibility of an institutionalized spouse. Therefore, when a social services district determines the income and resources of an institutionalized spouse and his or her community spouse, the assessment of the couple's resources will include pension funds and IRAs owned by the community spouse. From the total combined countable resources of the couple, the community spouse is allowed to keep resources in an amount equal to the spousal share (but not less than $74,820 and no more than the maximum community spouse resource allowance of $90,660, effective January 1, 2003). Resources that exceed the community spouse resource allowance are considered available to the institutionalized spouse. Currently, pension funds and IRAs owned by a community spouse which exceed the community spouse resource allowance are not deemed available to the institutionalized spouse.

Some representatives of Medicaid applicants and recipients have argued that the existing regulations require the community spouse's pension fund or IRA to be disregarded in the determination of the total countable resources of the couple, thereby allowing the community spouse to retain the pension fund or IRA in addition to the maximum community spouse resource allowance of $90,660. Since disregarding pension funds and IRAs in this manner is not provided for in federal or State statute, the proposed regulation would eliminate any possible confusion over the correct interpretation of such statutes with respect to pension funds and IRAs.

Costs:

Because it is not possible to obtain highly specific data for this issue, a maximum fiscal amount was used to estimate the maximum possible savings that would result from the proposed amendment. The proposed regulation could save the State up to approximately $718,000 per year of which the state share would constitute $288,000 (40%). These figures were arrived at by assuming that all couples identified with resources over $87,000 would be affected by the proposed regulation in addition to the savings the State would experience if all spousal impoverishment hearings were relevant to this issue.

Local Government Mandates:

The proposed regulatory amendment would not impose any new mandates. The amendment would clarify that in determining Medicaid eligibility for an institutionalized spouse, a community spouse's pension fund or IRA is a countable resource. The change adds clarity and specificity for local departments of social services administering the Medicaid program at the county level.

Paperwork:

No reporting requirements, forms, or other paperwork are necessitated by this proposed regulatory amendment. Currently, in determining Medicaid eligibility for an institutionalized spouse, social services districts must evaluate a pension fund or IRA owned by a community spouse.

Duplication:

The proposed regulatory amendment does not duplicate any existing State or federal requirements.

Alternatives:

As indicated above, advocates for Medicaid applicants and recipients have argued that the current regulations technically require the Medicaid program to allow community spouses to retain pension funds and IRAs in addition to the maximum community spouse resource amount. If the Medicaid program were required to adopt this interpretation, and exclude pension funds from the resource assessment, more of the couple's resources would be protected for the community spouse, and Medicaid expenditures would increase because institutionalized spouses would attain Medicaid eligibility sooner.

Since it is the wording of the existing regulations which is causing some client advocates to question the legal basis for the Department's policy on pension funds and IRAs, it is necessary to amend the regulations to clarify the correct policy. The alternative of leaving the regulations as currently worded was rejected, since it would leave unresolved the issue of the correct meaning of the regulations, and could result in a legal challenge to the Department's policy.

Federal Standards:

The proposed regulatory amendment complies with federal statute.

Compliance Schedule:

Single Life Table

Age	Distribution Period	Age	Distribution Period	Age	Distribution Period
	53.3	58	27.0	85	7.6
	52.4	59	26.1	86	7.1
	51.4	60	25.2	87	6.7
	50.4	61	24.4	88	6.3
	49.4	62	23.5	89	5.9
	48.5	63	22.7	90	5.5
	47.5	64	21.8	91	5.2
	46.5	65	21.0	92	4.9
	45.6	66	20.2	93	4.6
	44.6	67	19.4	94	4.3
	43.6	68	18.6	95	4.1
	42.7	69	17.8	96	3.8
	41.7	70	17.0	97	3.6
	40.7	71	16.3	98	3.4
	39.8	72	15.5	99	3.1
	38.8	73	14.8	100	2.9
	37.9	74	14.1	101	2.7
	37.0	75	13.4	102	2.5
	36.0	76	12.7	103	2.3
	35.1	77	12.1	104	2.1
	34.2	78	11.4	105	1.9
	33.3	79	10.8	106	1.7
	32.3	80	10.2	107	1.5
	31.4	81	9.7	108	1.4
	30.5	82	9.1	109	1.2
	29.6	83	8.6	110	1.1
	28.7	84	8.1	111+	1.0
	27.9				

ɐe the Joint and Last Survivor Table in IRS Publication 590. For ages ɐered in tables above, see IRS Publication 590.

REQUIRED MINIMUM DISTRIBUTIONS

IRS Publication 590
Reg. §1.401(a)(9)-0 through -9, Reg. §1.408-8

) Calculation—Lifetime Distributions

MD for each calendar year is the account balance on De- ır 31 of the preceding year divided by the distribution period ıe *Uniform Lifetime Table*, Page 14-18, for the owner's age end of the distribution year.

ɔle: Carter and Ann each have an IRA valued at $90,000 on Decem- , 2004. Carter was born on September 5, 1934. Ann was born on ı 5, 1935. Both reach age 70½ in 2005. Carter will be 71 at the end l5; Ann will be 70. Their minimum distributions for 2005 are:

ar ..... $90,000 ÷ 26.5 = $3,396
..... $90,000 ÷ 27.4 = $3,285

ɕtion: If the owner's sole beneficiary mes during the year is a spouse han 10 years younger than the use the distribution period from ınt and Last Survivor Table in IRS ɜtion 590 for a smaller RMD. Marital is determined on January 1 of the ɹtion year. The owner does not fail to spouse as beneficiary because of or divorce later in the year unless the changes beneficiaries before the the year (or before the spouse's . [Reg. §1.401(a)(9)-5, Q&A 4(b)]

Account balance rules:

- Disregard distributions made after December 31. Under the old rules, if an IRA owner received the first year RMD between January 1 and April 1 of the year following the year he or she reached age 70½, the account balance for the second year was reduced by the first year's RMD. The new rules no longer require this.
- If a rollover from a retirement plan or IRA is pending on December 31 (distribution was made but the funds did not reach the receiving IRA), increase the account balance of the receiving IRA by the rollover amount.
- See Regulation Section 1.401(a)(9)-5, question and answer 3, for account balance adjustments for qualified plans.

IRAs AT DEATH

IRS Publication 590

RMD Calculation—Year of Death

The RMD is calculated under the rules for lifetime distributions as if the owner had lived through the year. The beneficiary must take the owner's RMD by year-end if the owner died before taking distribution. If the owner died before reaching his or her required beginning date for distributions, no distribution is required in the year of death [Reg. §1.401(a)(9)-5, Q&A 4(a)]. These rules apply even if the spouse rolls over the IRA in the calendar year of death. The spouse is not required to take a minimum distribution as the IRA owner for the year of death. [Reg. §1.408-8, Q&A 5(a)]

Rules for Surviving Spouse

A person who inherits an IRA from a spouse can elect to treat the IRA as his or her own or can choose to be treated as a beneficiary.

Rollover—Spouse treated as owner. A spouse can roll the IRA over into an IRA in his or her name or can designate himself or herself as the owner of the inherited account. The taxable portion can also be rolled into a qualified employer plan or 403(a), 403(b) or 457 plan. Once ownership has changed to the spouse, the rules that apply to any other IRA owned by the spouse apply to the inherited account for the calendar year of the change and in all subsequent years. The spouse may contribute to the account, the 10% early withdrawal penalty applies, RMDs begin when the spouse reaches his or her required beginning date and are based on the spouse's life expectancy.

Spouse treated as beneficiary. If the spouse does not roll the IRA over or elect to be treated as the owner, the rules that apply to other beneficiaries discussed below apply to the IRA. A spouse who has not reached age 59½ can take distributions from the IRA without penalty by choosing to be treated as a beneficiary.

A spouse will be considered to have chosen to treat the IRA as his or her own if: (1) the spouse contributed to the IRA or an RMD under the beneficiary rules was missed, and (2) the spouse is sole beneficiary with an unlimited right to withdraw amounts and the RMD for the year of death was made.

Distributions from a deceased spouse's IRA can be rolled over within the 60-day time limit if the distribution is not a required distribution. Rollover is allowed even if the spouse is not the sole beneficiary.

Rules for Beneficiaries

- 10% early withdrawal penalty does not apply to distributions.
- Beneficiaries cannot roll amounts out of inherited IRAs and into their own IRAs.
- No contributions can be made to inherited IRAs.

Nontaxable Return of Contributions

Total investment in contract ..... 1) _____

Number of expected payments ..... 2) _____

Divide line 1 by line 2 ..... 3) _____

ne 1. Total after-tax contributions to the plan minus any amount ceived before the annuity starting date that was excluded from gross come.

ne 2. Total number of expected payments from the plan. Use the mber from the following tables based on annuity start date and age participant at annuity start date. If the number of payments is fixed der the terms of the plan, that number is used rather than the numbers m the tables.

ne 3. Nontaxable portion of each annuity payment received.

nuities starting:	***After July 1, 1986, Before Nov. 19, 1996***	***After Nov. 18, 1996, Before Jan. 1, 1998***
ge at annuity tarting date	*Line 2 amount*	*Line 2 amount*
5 or under	$ 300	$ 360
6 – 60	260	310
1 – 65	240	260
6 – 70	170	210
1 or older	120	160

uities starting after December 31, 1997. The table used ends on whether the payments are based on the life of more one individual. If the annuity is payable to a primary annuitant to more than one survivor annuitant, the combined age is the of the primary annuitant plus the youngest survivor annuitant. annuity is payable to more than one survivor annuitant and is no primary annuitant, the combined age is the age of the st survivor annuitant plus the youngest survivor annuitant.

Single Life Annuity		Multiple Lives Annuity	
al annuity ing date	*Line 2 amount*	*Combined age at starting date*	*Line 2 amount*
under	$ 360	110 and under	$ 410
60	310	111 – 120	360
65	260	121 – 130	310
70	210	131 – 140	260
older	160	141 and over	210

ral rule required. The simplified method cannot be used for f the following:

qualified plans (such as nonqualified employee plans or mercial annuities),

lified plan if the annuitant is age 75 or older and if the annuity ments are guaranteed for at least five years, or

ndividual retirement account or annuity.

MP-SUM DISTRIBUTIONS (FORM 4972)

payer has two choices when a lump-sum ution is received from a retirement plan.

ll over part or all of it. See *Rollovers d Transfers* on Page 14-10.

y tax on the distribution. If the taxpayer cts to pay the tax, the lump-sum tribution may qualify for 10-year raging.

ar averaging is available for individuals tained age 50 prior to January 1, 1986 born before 1936). See Instructions m 4972 for qualifications to use r averaging.

Ten-Year Averaging — Quick Tax Computation Method at 1986 Rates

Ten-year averaging is only available to those born before 1936.

Caution: Do not use this chart to complete Form 4972. See the *1986 Tax Rate Schedule* below.

Adjusted Taxable Lump-Sum Distribution			Multiply by this %		Subtract this amount*	
$ 0	to $ 20,000		× 5.5%	– $ 0	=	Tax
20,001	to 21,583		× 13.2	– 1,540	=	Tax
21,584	to 30,583		× 14.4	– 1,799	=	Tax
30,584	to 49,417		× 16.8	– 2,533	=	Tax
49,418	to 67,417		× 18.0	– 3,126	=	Tax
67,418	to 70,000		× 19.2	– 3,935	=	Tax
70,001	to 91,700		× 16.0	– 1,695	=	Tax
91,701	to 114,400		× 18.0	– 3,529	=	Tax
114,401	to 137,100		× 20.0	– 5,817	=	Tax
137,101	to 171,600		× 23.0	– 9,930	=	Tax
171,601	to 228,800		× 26.0	– 15,078	=	Tax
228,801	to 286,000		× 30.0	– 24,230	=	Tax
286,001	to 343,200		× 34.0	– 35,670	=	Tax
343,201	to 423,000		× 38.0	– 49,398	=	Tax
423,001	to 571,900		× 42.0	– 66,318	=	Tax
571,901	to 857,900		× 48.0	– 100,632	=	Tax
	Over 857,900		× 50.0	– 117,790	=	Tax

* Some numbers were rounded to the nearest dollar.

1986 Tax Rate Schedule for Use in Completing Form 4972

If Taxable Income: Is over—	but not over—	Tax Equals:			of the amount over—
$ 0	$ 1,190	$ 0.00	+	11%	$ 0
1,190	2,270	130.90	+	12	1,190
2,270	4,530	260.50	+	14	2,270
4,530	6,690	576.90	+	15	4,530
6,690	9,170	900.90	+	16	6,690
9,170	11,440	1,297.70	+	18	9,170
11,440	13,710	1,706.30	+	20	11,440
13,710	17,160	2,160.30	+	23	13,710
17,160	22,880	2,953.80	+	26	17,160
22,880	28,600	4,441.00	+	30	22,880
28,600	34,320	6,157.00	+	34	28,600
34,320	42,300	8,101.80	+	38	34,320
42,300	57,190	11,134.20	+	42	42,300
57,190	85,790	17,388.00	+	48	57,190
85,790	.....	31,116.00	+	50	85,790

Uniform Lifetime Table

Age	*Distribution Period*	*Age*	*Distribution Period*	*Age*	*Distribution Period*
70	27.4	86	14.1	101	5.9
71	26.5	87	13.4	102	5.5
72	25.6	88	12.7	103	5.2
73	24.7	89	12.0	104	4.9
74	23.8	90	11.4	105	4.5
75	22.9	91	10.8	106	4.2
76	22.0	92	10.2	107	3.9
77	21.2	93	9.6	108	3.7
78	20.3	94	9.1	109	3.4
79	19.5	95	8.6	110	3.1
80	18.7	96	8.1	111	2.9
81	17.9	97	7.6	112	2.6
82	17.1	98	7.1	113	2.4
83	16.3	99	6.7	114	2.1
84	15.5	100	6.3	115+	1.9
85	14.8				

APPENDIX C. Uniform Lifetime Table

Table III
(Uniform Lifetime)

(For Use by:

- **Unmarried Owners,**
- **Married Owners Whose Spouses Are Not More Than 10 Years Younger, and**
- **Married Owners Whose Spouses Are Not the Sole Beneficiaries of their IRAs)**

Age	Distribution Period	Age	Distribution Period
70	27.4	93	9.6
71	26.5	94	9.1
72	25.6	95	8.6
73	24.7	96	8.1
74	23.8	97	7.6
75	22.9	98	7.1
76	22.0	99	6.7
77	21.2	100	6.3
78	20.3	101	5.9
79	19.5	102	5.5
80	18.7	103	5.2
81	17.9	104	4.9
82	17.1	105	4.5
83	16.3	106	4.2
84	15.5	107	3.9
85	14.8	108	3.7
86	14.1	109	3.4
87	13.4	110	3.1
88	12.7	111	2.9
89	12.0	112	2.6
90	11.4	113	2.4
91	10.8	114	2.1
92	10.2	115 and over	1.9

IRS Uniform lifetime Table for Calculating IRA distributions

TO: Local District Commissioners, Medicaid Directors

FROM: Judith Arnold, Director
Division of Health Reform and Health Insurance Exchange Integration

SUBJECT: 2012 Update to the Actuarial Life Expectancy Table

EFFECTIVE DATE: Immediately

CONTACT PERSON: Local District Support Unit
Upstate (518) 474-8887 NYC (212) 417-4500

The purpose of this General Information System (GIS) message is to provide local departments of social services with the updated life expectancy table issued by the Office of the Chief Actuary of the Social Security Administration (SSA).

As advised in Administrative Directive 06 OMM/ADM-5, "Deficit Reduction Act of 2005 - Long-Term Care Medicaid Eligibility," the life expectancy table issued by SSA is required to be used in evaluating whether an annuity purchased by or on behalf of an applicant/recipient on or after February 8, 2006 is actuarially sound. The table is also used in determining whether the repayment term for a promissory note, loan or mortgage is actuarially sound.

The life expectancy table that was attached to 06 OMM/ADM-5 as Attachment VIII, is being updated to reflect the current information obtained from the Office of the Chief Actuary of the Social Security Administration. The revised life expectancy table is provided as an attachment to this GIS. Effective with the release of this GIS, districts must use the revised table.

Please direct any questions to your local district support liaison.

Life Expectancy Table

Age	Male Life Expectancy	Female Life Expectancy	Age	Male Life Expectancy	Female Life Expectancy
0	75.38	80.43	30	47.13	51.50
1	74.94	79.92	31	46.20	50.53
2	73.98	78.95	32	45.27	49.56
3	73.00	77.97	33	44.33	48.60
4	72.02	76.99	34	43.40	47.64
5	71.03	76.00	35	42.47	46.68
6	70.04	75.01	36	41.54	45.72
7	69.05	74.02	37	40.61	44.76
8	68.06	73.03	38	39.68	43.81
9	67.07	72.04	39	38.76	42.86
10	66.08	71.04	40	37.84	41.91
11	65.09	70.05	41	36.93	40.97
12	64.09	69.06	42	36.02	40.03
13	63.10	68.07	43	35.12	39.10
14	62.12	67.08	44	34.22	38.17
15	61.14	66.09	45	33.33	37.24
16	60.18	65.11	46	32.45	36.32
17	59.22	64.13	47	31.57	35.41
18	58.27	63.15	48	30.71	34.50
19	57.33	62.18	49	29.84	33.59
20	56.40	61.20	50	28.99	32.69
21	55.47	60.23	51	28.15	31.80
22	54.54	59.26	52	27.32	30.91
23	53.63	58.29	53	26.49	30.02
24	52.71	57.32	54	25.68	29.14
25	51.78	56.35	55	24.87	28.27
26	50.86	55.38	56	24.06	27.40
27	49.93	54.40	57	23.26	26.53
28	49.00	53.44	58	22.48	25.67
29	48.07	52.47	59	21.69	24.82

Age	Male Life Expectancy	Female Life Expectancy	Age	Male Life Expectancy	Female Life Expectancy
60.	20.92	23.97	90	3.92	4.69
61	20.16	23.14	91	3.64	4.36
62	19.40	22.31	92	3.38	4.04
63	18.66	21.49	93	3.15	3.76
64	17.92	20.69	94	2.93	3.50
65	17.19	19.89	95	2.75	3.26
66	16.48	19.10	96	2.58	3.05
67	15.77	18.32	97	2.44	2.87
68	15.08	17.55	98	2.30	2.70
69	14.40	16.79	99	2.19	2.54
70	13.73	16.05	100	2.07	2.39
71	13.08	15.32	101	1.96	2.25
72	12.44	14.61	102	1.85	2.11
73	11.82	13.91	103	1.75	1.98
74	11.21	13.22	104	1.66	1.86
75	10.62	12.55	105	1.56	1.74
76	10.04	11.90	106	1.47	1.62
77	9.48	11.26	107	1.39	1.52
78	8.94	10.63	108	1.30	1.41
79	8.41	10.03	109	1.22	1.31
80	7.90	9.43	110	1.15	1.22
81	7.41	8.86	111	1.07	1.13
82	6.94	8.31	112	1.00	1.05
83	6.49	7.77	113	0.94	0.97
84	6.06	7.26	114	0.87	0.89
85	5.65	6.77	115	0.81	0.82
86	5.26	6.31	116	0.75	0.75
87	4.89	5.87	117	0.70	0.70
88	4.55	5.45	118	0.64	0.64
89	4.22	5.06	119	0.59	0.59

ANTHONY J. PICENTE, JR.
COUNTY EXECUTIVE

LUCILLE A. SOLDATO
COMMISSIONER

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES
LEGAL DIVISION
MEDICAID RECOVERY UNIT
COUNTY OFFICE BUILDING
800 PARK AVENUE, UTICA, NEW YORK 13501
TELEPHONE 315.798.5474
FACSIMILE 315.798.6425
E-mail rmalpezzi@ocgov.net

TO: ELLEN LULEY
CC: JOAN JARECKI
MARYBETH OLNEY
FROM: BOB MAPEZZI
RE: ANNUITIES/RETIREMENT ACCOUNTS (ACTUARY TABLE USAGE)
DATE: JULY 15, 2014

In compliance with the Deficit Reduction Act, when an applicant is to receive income, from any of the above-referenced accounts, it is necessary that we ensure the annuitant receives maximum distribution and that the payments thereof are actuarially sound. There has been some uncertainty as to the proper table usage, SSA or IRS, and the following will clarify such:

1. Applicants with non-spousal budgeting will be subject to the SSA tables (same table used for life interest) in determining the actuarial soundness of their payments.

2. Applicants with spousal budgeting will be subject to the IRS tables in determining the actuarial soundness of their payments.

Due to the complexity of the IRS tables, the onus of establishing maximum payout/actuarial soundness shall fall upon the applicant. We shall require the applicant to obtain such via their Plan Administrator, who in turn, will use the IRS tables to determine the qualifying payout.

Incidentally, post-DRA annuities must be reviewed to ensure that the State or County is properly named as a beneficiary.

The contents of this document are consequential to my conversation with Eileen Brennan, State of New York - Office of Medicaid Management.

RESOURCES
TRANSFER OF ASSETS

ANNUITIES

Description: An annuity is contract with a life insurance company, designed to provide payments on a regular basis either for life or a term of years.

Policy: As a condition of eligibility, all persons applying for Medicaid coverage of nursing facility services, including requests for an increase in coverage for nursing facility services, must disclose a description of any interest he/she, or his/her spouse, may have in an annuity. The disclosure of interest in an annuity is required regardless of whether the annuity is irrevocable or counted as a resource. Additionally, for annuities purchased by an SSI-related A/R or the A/R's spouse on or after February 8, 2006, the State must be named as a remainder beneficiary in the first position for at least the amount of Medicaid paid on behalf of the institutionalized individual. In cases where there is a community spouse or minor or disabled child of any age, the State must be named the remainder beneficiary in the second position or named in the first position if such spouse or representative of such child disposes of any such remainder for less than fair market value.

NOTE: In instances where the annuity has been determined to be a countable resource, the State is NOT named a remainder beneficiary.

The social services district must require a copy of the annuity contract owned by the SSI-related A/R or the A/R's spouse in order to verify that the State has been named the remainder beneficiary. If the SSI-related A/R or the A/R's spouse fails or refuses to provide the necessary documentation, the district must treat the purchase of the annuity as a transfer of assets for less than fair market value.

Individuals who are applying for or receiving care, services or supplies pursuant to a waiver under subsection (c) or (d) of Section 1915 of the Social Security Act (SSA) are **not** subject to these requirements regarding annuities. In New York, such waiver services are provided through the Long Term Home Health Care Program (LTHHCP), Traumatic Brain Injury Waiver Program (TBI), Care at Home Program (CAH), the Office for People with Developmental Disabilities (OPWDD) Home and Community-Based Services (HCBS) Waiver, Home and Community- Based Services Waiver for Children with Serious Emotional Disturbance (Office of Mental Health [OMH]) and the Nursing Home Transition and Diversion Waiver (NHTD).

NOTE: Treatment of annuities for Partnership policy/certificate holders with Total Asset Protection OR Dollar for Dollar Asset Protection plans is discussed in **RESOURCES** NEW YORK STATE PARTNERSHIP FOR LONG TERM CARE.

RESOURCES
TRANSFER OF ASSETS

ANNUITIES

References:

SSL Sect.	366-a (2) 366 366-c 366-ee
Dept. Reg.	360-2.3 360-4.4 360-4.6
ADMs	10 OHIP/ADM-01 06 OMM/ADM-5 06 OMM/ADM-2 04 OMM/ADM-6 96 OMM/ADM-8
GISs	09 MA/027 07 MA/020 07 MA/018 07/MA/011 06 MA/016

Interpretation: The purchase of an annuity that does not name the State as a remainder beneficiary in the first position (or in the second position as explained above) will be treated as an uncompensated transfer of assets for SSI-related A/Rs. In addition, if an annuity is purchased by or on behalf of an SSI-related A/R, the purchase will be treated as a transfer of assets for less than fair market value unless the annuity is:

- An annuity described in subsection (b) or (q) of Section 408 of the Internal Revenue Code of 1986; or
- Purchased with the proceeds from an account or trust, described in subsection (a), (c), or (p) of Section 408 of such Code; a simplified employee pension (within the meaning of Section 408 (k) of such Code); or a Roth IRA described in Section 408A of such Code; or

RESOURCES
TRANSFER OF ASSETS

ANNUITIES

The annuity is:

- Irrevocable and non-assignable;
- Is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); **AND**
- Provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payments made.

NOTE: These provisions apply to transactions, including purchases which occur on or after February 8, 2006. Transactions subject to these provisions include any action by the individual that changes the course of payment from the annuity or that changes the treatment of the income or principal of the annuity. These transactions include additions of principal, elective withdrawals, requests to change the distribution of the annuity, elections to annuitize the contract and similar actions.

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: August 3, 2009
CASE #: M00J20372
AGENCY: Suffolk
FH #: 5337190Z

In the Matter of the Appeal of

: DECISION AFTER FAIR HEARING

from a determination by the Suffolk County Department of Social Services

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on October 15, 2009, in Suffolk County, before Timothy Hannon, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

Tara A. Scully, Esq., Burner, Smith & Associates LLP

For the Social Services Agency

Elinor Fibel, Fair Hearing Representative

ISSUE

Was the Agency's determination to deny the Appellant's application for Medical Assistance for the Appellant, , because the Appellant's household has available non-exempt resources exceeding the applicable eligibility limit correct?

Was the Agency's determination that the amount of the Appellant's contribution toward the cost of the Appellant's care for the subject period correct?

FINDINGS OF FACT

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. On May 7, 2009, an application for Medical Assistance was filed with the Agency on behalf the Appellant, a married 76 year old man.

2. The Appellant's spouse is sixty eight years old and resides in the community. Her Life Expectancy of 16.80 years is based on Attachment VIII of 06 OMM/ADM-5. The Appellant's Life Expectancy factor in this attachment is 9.29.

3. The Appellant entered Long Island State Veteran's Home, a skilled care facility on June 26, 2009.

4. As of the filing of the May 7, 2009 Medicaid application, the Appellant was seeking home care and day care benefits through the Community Medicaid Program with a pick-up date of April 1, 2009. The Appellant was attending the Long Island State Veterans Home Adult Day Care Program.

5. At this Fair Hearing, Counsel is only disputing the Medical Assistance denial for the period April 1, 2009 to June 26, 2009.

6. As of this Hearing, the Appellant's request for conversion of Community Medical Assistance to Chronic Care Medical Assistance is pending.

7. The Agency computed a Total Resource Snap Shot of April 2009, for the Appellant, in the amount of $78,398.49, as follows:

Institutionalized Spouses Resources			
Vanguard acct.	#	– [IRA]	$30,467.61
Chase acct.	#	-joint – half counted	$ 324.14
Chase acct.	#	joint – half counted [IRA]	$ 4,763.32
TFCU acct.	#	-joint – half counted	$ 6.93
TFCU acct.	#	-joint – half counted [IRA]	$ 9,318.83
TFCU acct.	#	-joint – half counted [IRA]	$ 25,913.69
TFCU acct.	#	joint – half counted	$ 11,049.23
TFCU acct.	#	-joint – half counted	$ 100.03
TFCU acct.	#	-joint – half counted [IRA]	$ 4,716.95
TFCU acct.	#	joint – half counted	$ 4.00
Gurney's Time Share – half counted			$ 2,766.57
TFCU acct	#	– joint half counted [IRA]	$ 2,767.19
Total Resources			$ 92,198.49
Less: MA Level			-$ 13,800.00
Excess Resources			$ 78,398.49

8. On June 10, 2009, the Agency determined to deny the Appellant's application for Medical Assistance for the Appellant on the grounds that "the applicant has excess resources valued at $78,398.49."

9. Counsel contends that the Agency misapplied the Regulations and incorrectly considered the Appellant's IRAs, which were not maximized according to the Agency's policy (Attachment VIII of 06 OMM/ ADM-5), as non-exempt resources.

10. The 2009 monthly distributions for the Appellant's IRA accounts was based on the Life Expectancy factor of the Appellant's younger spouse (16.80) as contained in Attachment VIII of 06 OMM/ ADM 5).

11. The Agency's calculation was in error for TFCU account # 517, a joint bank account. The Agency counted resources of $11,049.23. However, the account balance as of April 1, 2009, was $2,098.47.

12. On August 3, 2009, the Appellant requested this fair hearing.

APPLICABLE LAW

A person who is sixty-five years of age or older, blind or disabled who is not in receipt of Public Assistance and has income or resources which exceed the standards of the Federal Supplemental Security Income Program (SSI) but who otherwise is eligible for SSI may be eligible for Medical Assistance, provided that such person meets certain financial and other eligibility requirements under the Medical Assistance Program. Social Services Law Section 366.1(a)(5).

If the applicant's or recipient's resources exceed the resource standards, the applicant or recipient will be ineligible for Medical Assistance until he/she incurs medical expenses equal to or greater than the excess resource standards. 18 NYCRR 360-4.1. The applicant or recipient will be given 10 days from the date he or she is advised of the excess resource amount to reduce the excess resources by establishing a burial fund. In addition, they will be advised that they may spend excess resources on exempt burial space items during this 10 day period. 91 ADM-17.

Administrative Directive 91 ADM-17 advises local districts of procedures for the treatment of Medical Assistance applications in cases where an applicant/recipient has resources in excess of the applicable resource standard. Potential MA eligibility for all applicant/recipients who have resources above the applicable resource standard must be investigated when applicant/recipients have outstanding medical bills. Eligibility determinations must include a snapshot comparison of excess resources as of the first of the month to viable bills. This comparison must be done for each month in which eligibility is sought, including each of the retroactive months. The client is not eligible until the amount of viable bills is equal to or greater than the amount of excess resources remaining after the purchase of burial-related items. Eligibility will be authorized after excess resources and any excess income are fully offset by viable bills. Excess resources must be offset by viable bills before such bills are used to offset excess income. Said Directive further provides that whenever a notice is sent to an applicant accepting the applicant with a spend down requirement or denying an application because of

excess resources, the Agency is required to include a copy of the "Explanation of the Excess Resource Program" along with the Notice.

Pursuant to GIS 08 MA/035, the resource levels for SSI-related budgeting effective January 1, 2009 are as follows:

Family Size	Resource Level
1	$13,800
2	20,100
3	23,115
4	26,130
5	29,145
6	32,160
7	35,175
8	38,190
For each additional persons add	+3,015

Resources are defined in 18 NYCRR 360-4.4(a). It means property of all kinds, including real property and personal property. It includes both tangible and intangible property.

An applicant's/recipient's available resources include:

(1) all resources in the control of the applicant/recipient. It also includes any resources in the control of anyone acting on the applicant's/recipient's behalf such as a guardian, conservator, representative, or committee;

(2) certain resources transferred for less than fair market value as explained in subdivision (c) of section 360-4.4 of 18 NYCRR;

(3) all or part of the equity value of certain income-producing property, as explained in 18 NYCRR 360-4.4(d); and

(4) certain resources of legally responsible relatives, as explained in 18 NYCRR 360-4.3(f); and

(5) certain resources of an MA-qualifying trust, as explained in 18 NYCRR 360-4.5.

For those subject to resource limits, Regulations at 18 NYCRR 360-4.6 and 360-4.7 provide that certain resources be disregarded in determining eligibility for Medical Assistance. Certain of the following disregards are applicable to all persons; others are applicable only to certain categories of persons.

- a homestead which is essential and appropriate to the needs of the household.
- Essential personal property including but not limited to clothing and personal effects, household furniture, appliances and equipment, tools and equipment necessary for a trade

or business, an automobile, one burial plot or space per household member, savings equal to at least one-half of the appropriate allowed income exemption.

Regulations at 18 NYCRR 360-4.6 provides for resource disregards for applicants and recipients who are 65 years of age or older, certified blind or certified disabled:

The disregards for such persons include:

1. all property which is contiguous to the applicant's/recipient's homestead;

2. life insurance policies with a combined face value of $1,500 or less;

3. on or after September 1, 1987, pension funds belonging to an ineligible or non-applying legally responsible relative which are held in individual retirement accounts or in work-related pension plans, including plans for self-employed individuals such as Keogh plans. However, amounts disbursed from a pension fund to a pensioner are income to the pensioner which will be considered in the deeming process;

06 OMM/ ADM-5 at pages 5 and 6 states: effective August 1, 2006 if an applicant or recipient seeking coverage for nursing facility services purchased an annuity on or after February 8, 2006 the State must be named as the beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant, or the State must be named in the second position after a community spouse or minor or disabled child and must be named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value. If the applicant/recipient or applicant or recipient's spouse fails or refuses to so name the State as the remainder beneficiary the purchase will be considered a transfer of assets for less than fair market value. In addition, if an annuity is purchased by or on behalf of an applicant or recipient,, the purchase will be treated as a transfer of assets for less than fair market value unless the annuity is:

- an annuity described in subsection (b) or (q) of Section 408 of the Internal Revenue Code of 1986, or

- purchased with the proceeds from an account described in subsection (a), (c), (p) of Section 408 of such Code; a simplified employee pension within the meaning of Section 408(k) of such Code; or a Roth IRA described in section 408A of such Code; or

the annuity is:

- irrevocable and non-assignable;

- is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and

- provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payments made.

The annuity provisions apply to transactions, including purchases, which occur on or after February 8, 2006. Transactions subject to these provisions include any action by the individual that changes the course of payment from the annuity or that changes the treatment of the income or principal of the annuity. These transactions include additions of principal, elective withdrawals, requests to change the distribution of the annuity, elections to annuitize the contract and similar actions. Social Services Law 366.5(e), 06 OMM/ADM-5.

The Suffolk County Department of Social Services Notice of Rules for the Treatment of Annuities (MA-174) further states:

For the annuity to be actually sound, the attached Life Expectancy Chart must be used. The age and value of the account(s) as of the date coverage is being sought should be used. If there is a non-applying spouse, the age of the spouse with the greater Life Expectancy can be used.

General Information System Message 98 GIS MA/024 clarifies the Department's policy concerning the treatment of retirement funds for the purposes of determining Medicaid eligibility. Retirement funds are annuities or work-related plans for providing income when employment ends (e.g., pension, disability or other retirement plans administered by an employer or union.) Other examples are funds held in an individual retirement account (IRA) and plans for self-employed individuals, sometimes referred to as Keogh plans.

A retirement fund owned by an individual is a countable resource if the individual is not entitled to periodic payments but is allowed to withdraw any of the funds. The value of the resource is the amount of money that the individual can currently withdraw.

Periodic Payments

Medicaid A/Rs who are eligible for periodic retirement benefits must apply for such benefits as a condition of eligibility. If there are a variety of payment options, the individual must choose the maximum income payment that could be made available over the individual's life time. (By option for a married individual will usually be less than the maximum income payment option that is available to a single individual). Once an individual is receiving periodic payments, the payments are counted as unearned income on a monthly basis, regardless of the actual frequency of payment

Once an individual is in receipt of or has applied for periodic payments, the principal in the retirement fund is not a countable resource. This includes situations where a Medicaid applicant has already elected less than the maximum periodic payment amount and this election is irrevocable. In such situations only the periodic payment amount received is counted as income and the principal is disregarded as a resource.

Department Regulations at 18 NYCRR 360-7.5(a) set forth how the Medical Assistance Program will pay for medical care. Generally the Program will pay for covered services which are necessary in amount, duration and scope to providers who are enrolled in the Medical Assistance program, at the Medical Assistance rate or fee which is in effect at the time the services were provided. 18 NYCRR 360-7.5(a)

In instances where an erroneous eligibility determination is reversed by a social services district discovering an error, a fair hearing decision or a court order or where the district did not determine eligibility within required time periods, and where the erroneous determination or delay caused the recipient or his/her representative to pay for medically necessary services which would otherwise have been paid for by the Medical Assistance Program, payment may be made directly to the recipient or the recipient's representative. Such payments are not limited to the Medical Assistance rate or fee but may be made to reimburse the recipient or his/her representative for reasonable out-of-pocket expenditures. The provider need not have been enrolled in the Medical Assistance program as long as such provider is legally qualified to provide the services and has not been excluded or otherwise sanctioned from the Medical Assistance Program. An out-of-pocket expenditure will be considered reasonable if it does not exceed 110 percent of the Medical Assistance payment rate for the service. If an out-of-pocket expenditure exceeds 110 percent, the social services district will determine whether the expenditure is reasonable. In making this determination, the district may consider the prevailing private pay rate in the community at the time services were rendered, and any special circumstances demonstrated by the recipient. 18 NYCRR 360-7.5(a)

Section 360-2.4(c) of the Regulations provides that an initial authorization for Medical Assistance will be made effective back to the first day of the first month for which eligibility is established. A retroactive authorization may be issued for medical expenses incurred during the three month period preceding the month of application for Medical Assistance, if the applicant was eligible for Medical Assistance in the month such care or services were received.

Payment may be made to a recipient or the recipient's representative for reimbursement of paid medical bills for services received during the recipient's retroactive eligibility period, provided that the recipient was eligible in the month in which the services were received. For services received during the period beginning on the first day of the third month prior to the month of the Medical Assistance application and ending on the date the recipient applied for Medical Assistance payment can be made without regard to whether the provider of services was enrolled in the Medical Assistance program. However, if the services were furnished by a provider who was not enrolled, the provider must have been otherwise lawfully qualified to provide such services, and must not have been excluded or otherwise sanctioned from the Medical Assistance Program. If services were provided when the recipient was temporarily absent from the State, payment will be made if: Medical Assistance recipients customarily use medical facilities in the other state; or the services were obtained to treat an emergency medical condition resulting from an accident or sudden illness. 18 NYCRR 360-7.5(a)

For services received during the period beginning after the date the recipient applied for Medical Assistance and ending on the date the recipient received his or her Medical Assistance

identification card, payment may be made only if the services were furnished by a provider enrolled in the Medical Assistance program. 18 NYCRR 360-7.5(a)

Reimbursement will be limited to the Medical Assistance rate or fee in effect at the time the services were provided. 18 NYCRR 360-7.5(a)

DISCUSSION

The Appellant's Counsel submitted a valid Power of Attorney from , the Appellant's wife, who is acting as his Power of Attorney. The Appellant's Counsel also submitted a valid Authorization letter signed by , as Appellant's Power of Attorney giving the Appellant's Counsel authority to act for her at this fair hearing. The Authorization was admitted without objection by the Agency and the Appellant's Counsel was authorized to represent the Appellant at this fair hearing.

The Appellant's Counsel acknowledges that there is no issue of fact to be decided that would require the presence and testimony of the Appellant. Counsel states that all the facts necessary for this fair hearing were within the knowledge and possession of the Appellant's Counsel and the Appellant's direct testimony is not required for the issuance of this decision pursuant to the order in Varshavsky v. Perales.

The Agency's position is that the Appellant's Retirement Accounts, which were in pay-out status and revocable were not maximized pursuant to GIS 98 MA/024. The Appellant was required to use a Life Expectancy factor of 9.29 as described in Attachment VIII of 06 OMM/ ADM 5 to maximize this distribution. The Life Expectancy factor of 16.80 for his younger spouse to obtain the monthly distribution was insufficient to exempt these IRAs as resources. The Agency denied the Appellant's application on the grounds that the Appellant's Resources of $92,198.49 exceeded the statutory Resource Limit of $13,800.00, by $78,398.49. The Agency amended the notice from excess resources of $78,398.49 up to $97,947.98, on the grounds that the Agency is required to correct errors in a computation.

The Appellant's Counsel does not dispute the balances of the Appellant's enumerated Retirement Accounts or that they are revocable or that they are in pay-out status or that they are not distributed to the Life Expectancy Factor of 9.29 according to the Agency's policy (06 OMM/ADM 5). However, she disputes the Agency's determination that these IRA accounts are non-exempt as resources because they are not disbursed at the maximum level.

She contends that under the GIS 98 MA / 024, the pertinent IRS table must be utilized to determine the Required Minimum Distribution (RMD)]. There are no maximum distribution rules for IRAs under Federal Law. By taking this RMD, the applicant is maximizing his income to be paid over the course of his life expectancy. Under the IRS Uniform Life Time table the Life Expectancy factor of a 76 year old is 22.0 years. Alternatively, the Life Expectancy Table of 16.80 years, as set forth in 06 OMM/ ADM 5 for the Appellant's spouse should have been allowed to comply with the Agency's requirement of a maximized distribution. The MA-174 Notice states if there is a non-applying spouse, the age of the spouse with the greater Life

Expectancy can be used. Furthermore, the evaluation of these IRAs under the Deficit Reduction Act 2005 and MA -174 was not correct. Annuities described in subsection (b) or (q) of Section 408 of the Internal Revenue Code of 1986 or purchased with the proceeds from an account described in subsection (a),(c), (p) of Section 408 of such Code; a simplified employee pension (within the meaning of Section 408 (K) of such code) or a Roth IRA described in Section 408 A of such code are excluded from the DRA of 2005 and MA-174.

The Agency action is not correct and is reversed as they have not established that the Appellant's household has Excess Resources. GIS 98 MA/024 governs IRAs or retirement funds. The Agency's reliance on Life Expectancy tables attached to 06 OMM/ ADM-5 is an error of law. That Life Expectancy Table is applicable to the annuities that are governed by 06 OMM/ADM-5. The IRAs are annuities excluded from 06 OMM/ADM-5 because they fall within Section 408 of the IRS Code and the cited 98 GIS. Under the IRS code the RMD of IRAs should be based on the IRS tables. These IRAs were in payout status based on the wife's life expectancy or 16.80 years as set forth in 06-OMM/ ADM-5. The Appellant's Memorandum (page 9) states that the distributions for the IRAs using this life factor is as follows: Vanguard (#2212) $151.12 monthly; TFCU(#518 A/C 175) $257.08 per month and Chase Bank (#1766) $47.25. per month.

The Life Expectancy Factor for a 76 year old using the IRS Uniform Life Time Table is 22.0 years. The distributions based on the Life Expectancy factor of 22.0 years in the IRS Uniform Life Time Table would be as follows: Vanguard (#2212) $115.41, TFCU (#518 A/c 175) $196.32 and Chase Bank (#1766) $36.09 monthly. The periodic payments using the Life Expectancy factor of 16.80 cited in the Attachment to 06 OMM/ ADM 5 are higher than the RMD calculated pursuant to the 22.00 Life Factor in this IRS table. The Appellant has chosen more than the maximum income payment that could be made available over an individuals' life time as required by d GIS 98 MA/024. Once an individual is in receipt of or has applied for periodic payments, the principal in the retirement fund is not a countable resource. Thus, the Agency's June 10, 2009 Notice denying Medical Assistance because of excess non-exempt resources cannot be sustained.

It is noted that the Agency, at this fair hearing, amended the calculation of their determination of excess resources from $78,398.49, to $97,947.98, because of a miscalculation of the Agency worker. The Agency is bound by the excess resource figure set forth in its June 10, 2009 Notice. It is not precluded from issuing an amended Notice if the Appellant is still ineligible due to excess resources after compliance with this Decision.

The Agency and Counsel are in agreement that the request for a fair hearing on the issue of Chronic Care budgeting is not necessary as the Appellant was denied for Excess Resources and not Excess Income and so is not an issue of this fair hearing.

DECISION AND ORDER

The Agency's determination to deny the Appellant's application for Medical Assistance for the Appellant because the Appellant's household has available non-exempt resources exceeding the applicable eligibility limit is not correct and is reversed.

1. The Agency is directed to continue to process the Appellant's May 7, 2009 Medical Assistance application.

2. The Agency is directed to give the Appellant a reasonable opportunity to establish the required maximum distribution of his IRAs pursuant GIS 98 MA/ 024 and the applicable IRS table.

3. The Agency is directed to authorize Medical Assistance retroactive to the May 2009 application if eligibility can be established and to advise the Appellant in writing of its determination.

The Agency's determination that the amount of the Appellant's contribution toward the cost of the Appellant's care for the subject period is not an issue for this fair hearing.

Should the Agency need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant's representative promptly in writing as to what documentation is needed. If such information is required, the Appellant's representative must provide it to the Agency promptly to facilitate such compliance.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
12/10/2009

NEW YORK STATE
DEPARTMENT OF HEALTH

By

Thelma Lee

Commissioner's Designee

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In the matter of the application of
Virginia Entz

Petitioner(s),

vs. DECISION

Kelly Reed, Commissioner, Monroe County
Department of Human Services and
Richard F. Daines, MD, Commissioner,
New York State Department of Health, Index No.: 2009-10454

Respondent(s).

Petitioner, per Article 78 of the New York Civil Practice Law and Rules, seeks judicial review of the determination of John G. Herriman, Administrative Law Judge on behalf of the New York State Department of Health (hereafter "Department"). That decision ruled that the petitioner, Virginia Entz, was not eligible for medicaid benefits because she had not named the Department as beneficiary of an annuity owned by her individual retirement account (hereafter "IRA"), and further held that such action made that portion of the IRA a transfer of an "available resource", making her ineligible for benefits on recertification.

FACTS

The petitioner/applicant Virginia Entz is an 80 year old woman who has resided at St. Anne's Home in Rochester, New York since November 27, 2006. She applied for and received medical assistance (hereafter "Medicaid") originally effective for February 1, 2008. A recertification application was filed for the applicant December 13, 2008. The Department issued its Notice of Decision dated December 11, 2008 which terminated Medicaid from January 1, 2009 through July 1, 2009, reasoning that the applicant "transferred" a Hartford IRA annuity on November 10, 2008 with a value of $64,624.84.

The annuity in question is a Hartford single premium annuity held in the applicant's IRA and was purchased August 17, 2005 as a roll-over from proceeds of the applicant's deceased

spouse's SIP account at Eastman Kodak Company.

The beginning value of the annuity on August 17, 2007 was $100,996.27 and the value of the annuity on it anniversary date on August 16, 2008 was $65,115.37. The decline in the account value represents periodic distributions plus a lump sum withdrawal which was used to pay an outstanding balance at the nursing home. The reduced principal in the annuity resulted in a reduction in the monthly distribution from the IRA to $294.27, which is an amount sufficient to meet the maximum distribution requirements based on the applicant's life expectancy under the Social Security Life Expectancy Tables. The beneficiaries of the IRA and of the underlying annuity are the applicant's children.

ISSUES

The petitioner raises the following issues:

1. whether the Department incorrectly treated an annuity contract owned by an IRA as an available resource;

2. whether an annuity contract owned by an IRA must name the Department as beneficiary to the extent of benefits paid in order to not be treated as an available resource; and

3. whether the Agency's determination is contrary to federal law.

DISCUSSION

1. Disclosure of Annuities.

The respondents argue that individuals seeking Medicaid coverage are required by both federal and New York law to disclose any interest they have in annuity contracts. The County posits that for annuities purchased by applicants on or after February 8, 2006 the State must be named the remainder beneficiary in the first position for at least the amount of Medicaid paid on behalf of the IRA account holder. The Administrative Law Judge on behalf of the New York State Department of Health determined "(t)he requirement to name the State as a remainder beneficiary is an independent requirement set forth under 42 USC 1396p(c)(1)(F) and applies to all annuities whether or not they comply with 42 USC 1396p(c)(1)(G)."

The petitioner counters that the requirement that the State be named the remainder beneficiary in the first position does not apply to this annuity, since it is owned by an IRA, having been purchased through her IRA on August 17, 2005. Since an IRA is not a "resource"

under Medicaid rules (See, in the matter of the appeal of AS, Fair Hearing Number 3701203h (Monroe County 2002), there simply is no requirement that an annuity inside an IRA name the Department as beneficiary.[1]

2. Federal law defines when is an "Annuity" an available resource.

The Deficit Reduction Act, enacted effective February 8, 2006, addressed what was considered to be a past abuse by planners, through the use of annuities and effectively eliminated the use of commercial or private annuities as an asset protection device.[2] The petitioner asserts that it is clear from federal legislation that annuities purchased with the proceeds from an IRA as described in Internal Revenue Code Section 408 are not available resources and are not assets. (See New York Social Service Law Section 366-c(2)(e) which excludes those resources which are excluded in determining eligibility for benefits under title XVI of the Federal Social Security Act.) Reference to federal law reveals that an IRA established under IRC Section 408 is therein

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[1] Petitioner cites Pages 5 and 6 of O6 OMM/ADM-5, which describes annuities and the treatment of Annuities. In pertinent part it states:

"If the A/R or the A/R's spouse fails or refuses to name the State as remainder beneficiary of an annuity purchased on or after February 8, 2006, the purchase will be considered a transfer of assets for less than fair market value."

The administrative memo continues that:

"...in addition, if an annuity is purchased by or on behalf of an A/R, the purchase will be treated as a transfer of assets for less than fair market value unless the annuity is" [An IRA or Roll-over IRA Annuity].

Moreover, the topic of Annuities is discussed a second time in the State Memo at 06 OMM/ADM-5, pages 22 and 23. Again the memo requires the disclosure of the Annuity and states:

"... the purchase of an annuity by or on behalf of an A/R is to be treated as a transfer of assets for less than fair market value unless:

the annuity is an individual retirement annuity contract...; or

the annuity is:

purchased with the proceeds from an individual retirement trust or account as described in subsection (a), (c) or (p) of Section 408 of the Internal Revenue Code;

[2] The rules governing Annuities are found at 42 U.S.C. Section 1396p(c)(1)(F), and are essentially mirrored in 06 ADM pages 5 and 6.

an exempted resource.[3]

Federal law indicates two types of annuity purchases that are not assets. The first is the IRA owned annuity, and the second is the annuity that is irrevocable, actuarially sound, provides for equal monthly payments, and names the Department as beneficiary.

Petitioner argues there are neither federal nor state requirements that an annuity owned by an IRA name the State as a beneficiary.

DECISION

The standard for court review of a CPLR Article 78 petition is whether the challenged agency determinations are arbitrary or capricious or lack a rational basis (see, Pell v Board of Education, 34 NY2d 222, 231 [1974]). Said differently, the issue before the court is whether the agency's determinations were lawful and supported by the record (see, Flacke v Onondaga Landfill Services, Inc., 69 NY2d 355, 363 [1987]). In reaching that determination, the court must give "great weight and judicial deference" to factual evaluations in the area of the agency's

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[3] 42 U.S.C. Section 1396p(c)(1)(G) states:

"(G) For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes an annuity purchased by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services under this title unless - (i) the annuity is-

(I) an annuity described in subsection (b) or (q) of section 408 of the internal Revenue Code of 1986; or

(II) purchased with proceeds from -

(aa) an account or trust described in subsection (a), (c), or (p) of section 408 of such Code;

(bb) a implied employee pension (within the meaning of section 408(k) of such Code); or

(cc) a Roth IRA described in section 408A of such title;

The Internal Revenue Code Section 408 describes Individual Retirement Accounts and Individual Retirement Annuities. Essentially, under IRA distribution rules an applicant can elect to take a minimum distribution payment (which increases every year as the individual ages) or an annuity payment (which is the same amount every year from the beginning of retirement until the death of the account holder).

expertise and, if the determination has a rational basis, the court cannot substitute its judgment for that of the agency. (Id. at 363; Matter of Peckham v Calogero, 12 NY3d 424, 431 [2009]). "While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency, because it is not their role to weigh the desirability of any action or to choose among alternatives." (Akpan v Koch, 75 NY2d 561, 570-571 [1990]; Matter of 310 South Broadway Corp. v McCall, 275 AD2d 549, 550 [3rd Dept. 2000], leave denied 96 NY2d 701 [2001]).

However, as held by the Fourth Department in Destiny USA Development, LLC v. New York State Dept. of Environmental Conservation 63 A.D.3d 1568 [2009], particularly in the context of a CPLR Article 78 proceeding, the court should also consider certain principles of statutory construction.

"We note at the outset the well-established principle that, 'where ... the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference' (Flacke v. Onondaga Landfill Sys., 69 N.Y.2d 355; see Matter of Lighthouse Pointe Prop. Assoc. LLC v. New York State Dept. of Envtl. Conservation, 61 A.D.3d 88). 'Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight' (Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459, Indeed, agency determinations that conflict with the clear wording of a statute are entitled to little or no weight (see Matter of Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98, 103; Kurcsics, 49 N.Y.2d at 459)."

Although in the context of a motion for leave to amend a complaint by adding a cause of action under Public Health Law § 2801-d, the Fourth Department stated in Kash v. Jewish Home and Infirmary of Rochester, N.Y., Inc. 61 A.D.3d 146 [2009]:

"As a general rule of statutory interpretation, application of a statute's clear language should not be ignored in favor of more equivocal evidence of legislative intent ... [, and] the most direct way to effectuate the will of the Legislature is to give meaning and force to the words of its statutes" (Desiderio v. Ochs, 100 N.Y.2d 159, 169). Thus, " 'where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning' " (Pultz v. Economakis, 10 N.Y.3d 542, 547)."

In the denial of Mrs. Entz' recertification, the respondent has relied on other agencies' proposed interpretations and has chosen to treat subsections (F) and (G) of section 1396p(c)(1)

conjunctively [4]such that the requirements of both subsections must be met before an annuity is not treated as a disposal of assets for less than fair market value.[5] Hence, the respondents conclude that the criteria for the purchase of an annuity to not be treated as a transfer of assets for less than fair market value are in addition to the requirements pertaining to the State's position as a remainder beneficiary.

This court reads (c)(1)(G) not conjunctively with (c)(1)(F), but as explicitly excluding from the term "assets" the qualified retirement annuities and IRAs described in section (G). Therefore, to give fair credence to federal law, the State must be named as remainder beneficiary of an annuity unless the annuity is accepted by the requirements of (c)(1)(G). An annuity that meets the requirements of (c)(1)(G) is not included within the term "assets" and its purchase cannot be treated as a disposal of an asset for less than fair market value.

The applicant Virginia Entz has an IRA which purchased, as an investment asset, an annuity. The applicant is receiving from that annuity an amount on a monthly basis sufficient to meet the maximum distribution requirement. The IRA itself is exempt from being treated as a resource and is free to purchase any investment provided that the IRA makes the required monthly distributions, which is occurring here. There is no further requirement that the IRA owned annuity must also name the State as beneficiary. Accordingly, the decision of the Monroe County Department of Human Services imposing a penalty by reason of the fact that there is an annuity owned by Virginia Entz' IRA is reversed and benefits for the applicant are reinstated without interruption.

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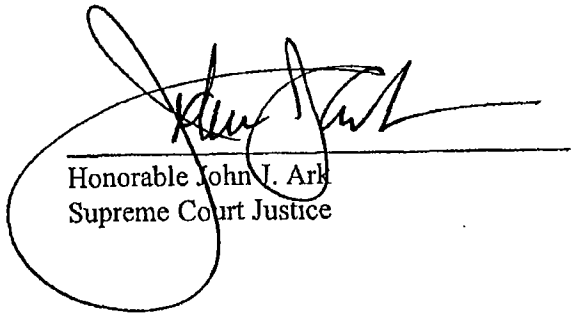
[4] Monroe County cites "Center For Medicare & Medicaid Services, Center for Medicaid and State Operations, Enclosure, Section 6012 Changes in Medicaid Annuity Rules Under the Deficit Reduction Act of 2005 (July 26, 2006)".

[5] Again, as set forth above, Administrative Law Judge Herriman determined: "(t)he requirement to name the State as a remainder beneficiary is an independent requirement set forth under 42USC 1396p(c)(1)(F) and applies to all annuities whether or not they comply with 42USC 1396p(c)(1)(G)."

This is the Decision of the Court.

Dated: March 9, 2010



Honorable John J. Ark
Supreme Court Justice