

## Elder Law and Special Needs Section

### Memorandum Regarding Treatment of Retirement Accounts and Annuities in the Medicaid Application and Budgeting Process

Elder # 10

October 2, 2015

Medicaid Applicants/Recipients (“Medicaid A/R”), attorneys advising such Applicants, and local Social Services Districts would benefit from written guidance from the New York State Department of Health regarding the proper treatment of retirement accounts, the appropriate life expectancy tables to use, and other ancillary issues relating to retirement accounts. New York State would realize efficiency in the administration of its Medicaid program and concurrent cost savings from minimization of fair hearings and administrative reviews by addressing the issues outlined below.

Clarification would provide uniformity in the rules and would reduce the number of Fair Hearings required to determine this issue. This works to the benefit of the Medicaid A/Rs as well as the State. The State would realize a reduction in Fair Hearing requests, thereby affording fiscal savings and easing the burden on the Administrative Law judges. Written directives on these issues from the Department of Health would further the objective of having the Medicaid program administered by a single state agency, and would allow all those State’s subdivisions that are currently administering the Medicaid program to uniformly follow such directives in keeping with 42 USC § 1396a(a)(1).

Specifically, the Elder Law and Special Needs Section asks the Department of Health to issue affirmative directives on these important issues:

1. For all Medicaid A/R under the age 70, the life expectancy tables issued by the Social Security Administration are to be used in determining the required payout structure for retirement accounts.
2. For all Medicaid A/Rs age 70 or older, the life expectancy tables issued by the Internal Revenue Service for the determination of calculating Required Minimum Distributions under the Internal Revenue Code are to be used in determining the required payout structure for retirement accounts.

3. For purposes of a Medicaid A/R who is commencing withdrawals on a retirement account, the value of the retirement account as of the end of the prior year is to be used in determining compliance with “payout status.”
4. In any instance in which an erroneous life expectancy table is used or an erroneous calculation in payout amounts may appear to have been made by the Medicaid A/R, the local district shall inform all Medicaid A/R of the correct table, calculation and commencement date and afford such Medicaid A/R a reasonable period of time in which to rectify such payouts, which may include corrective budgeting for a period of time. In addition, in any instance in which withdrawals made by the Medicaid A/R or community spouse exceed the required payout as calculated above, the local District shall not presume or require continued excess withdrawals for budgeting purposes.
5. GIS14 MA/028 is the proper mechanism for determining whether an annuity is actuarially sound, regardless of whether the annuity is within a retirement account or otherwise.
6. Annuities within a retirement account are exempt from the annuity requirements of 06 OMM/ADM-5, including the requirement that New York State be named as the remainder beneficiary.
7. It is possible and permissible for a Medicaid A/R and/or his/her community spouse to elect to maintain an annuity that is not in payout status and that does not comply with the provisions of 06 OMM/ADM-5 as a resource provided it does not exceed the non-exempt resource limit for the Medicaid A/R or the Community Spouse Resource Allowance (CSRA) for the community spouse.

#### Issue #1

The IRS has a life expectancy table, the Uniform Table, for required minimum distributions (RMDs) which calculates life expectancy beginning at age 70. However, an individual may begin taking distributions from his/her retirement account upon reaching age 59½ without the early withdrawal penalties otherwise imposed by the Internal Revenue Service. Disabled individuals may withdraw from a retirement account before age 59½, based upon provisions of Section 72(t) of the Internal Revenue Code, upon a determination of disability.

Unfortunately, as practitioners, we are seeing more and more persons in need of long term care who are not yet age 70. In complying with the Medicaid rules governing retirement accounts, Medicaid A/Rs under age 70 have the Social Security life expectancy table available to them to assist in determining the payout of a retirement account. Financial institutions and advisors look to the Medicaid A/Rs or their attorneys

for direction on payout sums in these instances. Therefore, an affirmative directive from the Department of Health indicating that for all Medicaid A/Rs under the age of 70, life expectancy in compliance with the Social Security Administration tables is desirable and would reduce confusion and afford uniformity to the treatment of such accounts across the State.

However, the clarification could go further, and direct, specifically, which Social Security life expectancy table is to be used.

We believe the starting point for the life expectancy table was contained in 96 ADM-8. This table has the life expectancy for an 85 year old man as 5.19 years.

That table was further updated in Attachment VIII to 06 OMM/ADM-5. This table has the life expectancy for an 85 year old man as 5.24 years. These tables appear to be based off of the Social Security Administration's Office of the Chief Actuary's life expectancy analysis.

In 2012, GIS 12 MA/025 was issued, "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)." This table has the life expectancy for an 85 year old man as 5.65 years. Further, the GIS stated that "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 SSA. However, the GIS indicates that it was applicable to annuities, promissory notes, loans or mortgages. There is no mention of retirement accounts.

In 2013, life expectancy tables were further updated in GIS 13 MA/020, again with the indication that it has updated the SSA life expectancies, but again relating to annuities, promissory notes, loans or mortgages. This table has the life expectancy for an 85 year old man as 5.80 years.

Most recently, an updated life expectancy table was appended to GIS 14 MA/28, "to reflect the current information obtained from the Office of the Chief Actuary of the Social Security Administration." This table has the life expectancy for an 85 year old man as 5.78 years. However, the GIS indicates that, in conformity with 06 OMM/ADM-5, the life expectancy table issued by SSA is to be used "in evaluating whether an annuity...is actuarially sound [and] in determining whether the repayment term for a promissory note, loan or mortgage is actuarially sound."

In all three GIS issuances, there is no indication that these updated tables from SSA should be applied to determining payout of retirement accounts.

The Medicaid Reference Guide, effective 9/26/11, at page 785.2, and updated January 2012, has a life expectancy table for annuities (and it is labeled as such) and is the life expectancy table identical to that appended to 06 OMM/ADM-5 as Attachment VIII.

Clarification from the Department of Health as to the applicability of GIS 14 MA/28 (and any subsequently released GIS directives) or the applicability of Attachment VIII to 06 OMM/ADM-5 in determining payout for a Medicaid A/R under the age of 70 would ensure uniformity in the treatment of retirement accounts for this population and would reduce confusion and additional administrative requests and burdens on Fair Hearing officers.

#### Issue #2

Despite our wishes that each Medicaid A/R consult an experienced elder law attorney before submitting an application for benefits, many Medicaid A/Rs prepare and submit their own applications, or use “Medicaid Application Preparation” services. These Medicaid A/Rs and their spouses who are over the age of 70 often rely upon advice of financial advisors, financial institutions, and other pseudo professionals for complying with the Internal Revenue Code’s requirements for required minimum distributions (RMDs) upon reaching age 70. Some Medicaid A/Rs have been relying upon the RMD stream of income for years before Medicaid benefits are needed. Confusion often arises when the Medicaid A/R is told that his/her RMDs are not sufficient. The long standing disconnect between the tax rules and Medicaid rules is extremely pronounced when a Medicaid A/R over the age of 70 is applying for Medicaid benefits.

A directive from the Department of Health that retirement accounts owned by Medicaid A/Rs and/or their spouses who are over the age 70 and who are receiving periodic payments in compliance with the Uniform Table promulgated by the Internal Revenue Service shall be deemed to be in payout status for Medicaid eligibility will reduce confusion among applicants, will ensure uniformity in the management of financial accounts, and will simplify local district caseworkers’ responsibility in processing applications. Instead of needing to conduct independent evaluations, the caseworker will be able to rely upon the Medicaid A/Rs tax returns and/or statements from financial institutions that the retirement account is in compliance with the RMD provisions of the Internal Revenue Code. This directive will afford savings in time and money for the State in streamlining the application process, and will reduce confusion among Medicaid A/Rs.

#### Issues #3 and Issue #4

Despite best intentions, with the ambiguity as to the correct tables to use, it is not uncommon for errors to be made in calculating the payout amounts. Questions arise as to whether the value of the account as of December 31 of the year prior to the year of application is appropriate, or the value of the retirement account as of the month of application should be used. Local districts use different measuring dates. This leads to confusion and inconsistent treatment among Medicaid A/Rs depending upon the local district in which they reside. Because Medicaid A/Rs over the age of 70 and their advisors are already relying upon December 31 of the prior year to comply with required minimum distribution rules, a directive from the Department of Health indicating that December 31 is the proper date on which to value a retirement account for determining

the periodic payments required would reduce confusion and ensure conformity throughout the State. Further, caseworkers analyzing an application would not need to conduct further calculations but could rely upon information already presented within the application, such as tax records, year-end statements from financial institutions, and other supporting documentation from institutions, to determine proper payout.

However, in those instances in which the case worker does determine an error was made, it is in the best interests of the Medicaid A/R and it is good public policy for the State to require the local Districts to afford the Medicaid A/R an opportunity to correct such errors. A directive from the Department of Health requiring local districts provide the Medicaid A/R with an explanation of the noted error, and what the local district believes to be the correct calculation, along with a period of time to rectify the situation is requested. The directive could permit local districts to implement a period of corrective budgeting – for example, a one month lump sum payment or a series of months in which NAMI is greater – in order to enable the Medicaid A/R to preserve the original application date and correct any errors resulting from payouts of retirement accounts.

Similarly, in circumstances where a Medicaid A/R or the Community Spouse has taken from a retirement account a sum that, upon the application of the appropriate life expectancy tables and valuation date as identified above, is revealed to be in excess of the required distribution amount, some local Districts “assume” that the excess distributions will continue prospectively. This is disadvantageous to the Community Spouse and penalizes a Medicaid A/R and/or the Community Spouse who had attempted to delay application for benefits for as long as possible. Rather, good public policy would dictate directing local Districts to arrive at the required calculations as outlined above and directing the Medicaid A/R or the Community Spouse to comply with those, rather than requiring the disproportionate withdrawal rates.

#### Issue #5, Issue #6 and Issue #7

Some retirement accounts invest in annuities. While there already exist two pieces of direction from the Department of Health regarding annuities, neither specifically address whether they apply to annuities within retirement accounts.

GIS 14 MA/28 contains updated life expectancy tables used to determine if an annuity is actuarially sound. 06 OMM/MA5 contains requirements for the treatment and evaluation of annuities.

An affirmative directive from the Department of Health that GIS 14 MA/28 is to be used to determine whether an annuity is actuarially sound regardless of whether the annuity is a retirement annuity or a non-qualified annuity would help erase some of the murkiness surrounding annuities.

Similarly, an affirmative directive indicating that the annuity provisions of 06 OMM/MA5 are not applicable to annuities contained within retirement accounts would further reduce confusion for both the caseworkers and the Medicaid A/R. One Supreme Court case in an Article 78 proceeding so declared (*see Entz v. Reed*, Supreme Court, Monroe County, Index No. 2009-10454, March 9, 2010), but a written directive from the Department of State would ensure that Medicaid A/R, elder law practitioners assisting them, and caseworkers within the local districts would be able to take a simplified approach to analyzing annuities: if the annuity is within a retirement account, apply GIS 14 MA/28 to ensure it is actuarially sound and do nothing further; if the annuity is not within a retirement account (even if it is a deferred annuity), screen for compliance with the provisions of 06 OMM/MA5.

Further, with a Community Spouse Resource Allowance of \$74,820 and, in certain circumstances, as high as \$119,220, it is possible that a community spouse may choose to retain or purchase an annuity with assets comprising his/her CSRA. An affirmative directive from the Department of Health that this is permissible and any such annuity is exempt from the requirements of 06 OMM/MA5 would enable the community spouse to retain autonomy and freedom of investment choices over his/her CSRA assets, and could work to benefit the State in that the community spouse may realize increased income which would increase contribution toward the cost of the Medicaid A/R spouse's care, and could also reduce the likelihood of impoverishment of the community spouse. As the State has already taken a position that a community spouse may benefit from investment in an annuity (so as to bring the community spouse who is lacking sufficient income up to the Minimum Monthly Maintenance Needs Allowance), it seems beneficial to permit a community spouse to elect to maintain an annuity – exempt from the obligations of 06 OMM/MA5.

Memorandum prepared by: Rene Reixach, Esq.  
Section Chair: Julie Ann Calareso, Esq.