

Memorandum Seeking Clarification or Rescission of GIS 14 MA/15 ELDER LAW & SPECIAL NEEDS SECTION

Elder #9

August 27, 2014

To: Daniel Tarantino, Director, Bureau of Health Insurance Programs
Judith A. Arnold, Director, Division of Health Reform and Health
Insurance Exchange
New York State Department of Health

From: New York State Bar Association Elder Law and Special Needs Section

Re: GIS 14 MA/15: Affordable Care Act - Requirement to Apply Spousal
Impoverishment Budgeting with Post-Eligibility Rules to Couples with a
Spouse Receiving Home and Community-Based Services Pursuant to a
Waiver or Enrolled in a Managed Long Term Care Plan

As you may know some local agencies have taken the position that when Spousal Impoverishment Budgeting is applied to Managed Long Term Care (MLTC) community-based cases that Post-Eligibility Budgeting is applied and deductions from income for deposits into a pooled supplemental needs trust are not allowed.

It is not clear to us whether this was the intent of the General Information System (GIS) message, however, imposing Post-Eligibility Budgeting in these cases is incorrect and does not comply with federal law.

The federal Patient Protection and Affordable Care Act (PPACA) March 23, 2010, P.L. 111-148, Title II, Subtitle E, § 2404, 124 Stat. 305, expanded the Medicaid spousal impoverishment protections for married persons receiving home and community-based services pursuant to a waiver program for five years by providing that during the five-year period that begins on January 1, 2014, §1924(h)(1)(A) of the Social Security Act (42 U.S.C. §1396r-5(h)(1)(A)) shall be applied as though instead of the phrase “(at the option of the State) is described in section 1902(a)(10)(A)(ii)(VI)” the following language is substituted:

is eligible for medical assistance for home and community-based services provided under subsection (c), (d), or (i) of section 1915 [42 USCS § 1396n], under a waiver approved under section 1115 [42 USCS § 1315], or who is eligible for such medical assistance by reason of being determined eligible under section 1902(a)(10)(C) [42 USCS § 1396a(a)(10)(C)] or by reason of section 1902(f) [42 USCS § 1396a(f)] or otherwise on the basis of a reduction of income based on

costs incurred for medical or other remedial care, or who is eligible for medical assistance for home and community-based attendant services and supports under section 1915(k) [42 USCS § 1396n(k)].

Both 42 U.S.C. §1396r-5(h)(1)(A), and the language that is substituted, only apply to the issue of redefining an institutional spouse and community spouse for the purpose of extending spousal impoverishment protections to spouses of persons receiving home and community-based services pursuant to waiver. Neither the current law nor the amendment enacted in the Affordable Care Act alter the Post Eligibility Budgeting rules for persons who are not in a medical institution or intermediate care facility. In fact the budgeting methodology imposed by 42 USC §1396a(r) does not apply to 1115 waivers; and 42 USC §§ 1396r-5(d)(1) and 1396a(q)(1)(a) specifically apply only to the cost of care in an institution. Likewise 42 CFR § 435.832 specifically applies only to medically needy individuals in medical institutions and intermediate care facilities.

The Section respectfully requests that the Department of Health clarify or rescind GIS 14 MA/15 to allow for use of the pooled trusts. Because of the immediate impact of this item on the public, we believe that time is of the essence. As you know the GIS change in budgeting is to be applied at renewal or first contact/case maintenance and some local agencies are implementing the change even before a first contact. We would be glad to meet with you in order to discuss this issue.

Section Chair: Richard A. Weinblatt, Esq.