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TOPIC: EXAMINING ABUSES OF MEDICAID ELIGIBILITY RULES

by Janice Eulau

Note from the Editor: This is an excerpt from the testimony provided to the U.S. House Subcommittee on Health Care, et al regarding the topic, “Examining Abuses of Medicaid Eligibility Rules.” Full testimony can be found at http://oversight.house.gov/index.php?option=com_content&view=article&id=1445%3A9-21-2011-qexamining-abuses-of-medicaid-eligibility-rulesq&catid=35&Itemid=40.

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

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

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

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

Wealthy applicants for Medicaid’s nursing home coverage consider that benefit to be their right, regardless of their ability to pay themselves. There is limited understanding that Medicaid for nursing home care remains a means-tested government pro-

gram, not an entitlement program. This misunderstanding seems to be perpetuated by the Elder Law and Medicaid Estate Planning industry.

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

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

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

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take months or years for each case and strain our limited local resources.

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

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

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

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

I also respectfully suggest that the law allowing spousal refusal be adjusted to enforce the current resource limits and allow the spouse at home to petition the court for higher resource levels should his/her circumstances call for such an increase instead of requiring the state to address each refusal.

Allowing wealthy spouses to ignore their financial responsibility to one another is a policy we cannot afford.

Attachment 6 is a copy of a website listing excerpts from an undated presentation to the National Academy of Elder Law Attorneys. Comments include a participant questioning why the statute



included as attachment 1 above is not followed in states other than New York, Florida and the District of Columbia. Based on the comments and information in the article, it appears that it was written prior to the Deficit Reduction Act of 2005, however the basic premise of spousal refusal remains the same.

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

Thank you. ■