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CMS Threatening Transfers Into Pooled Trusts By Those 65+

By Susan H. Levin

In the 15 years since passage of OBRA '93, many states have interpreted federal Medicaid law to allow disabled individuals of any age to both establish and fund pooled (d)(4)(C) trusts without penalty. On April 14, 2008, an official of the Centers for Medicare and Medicaid Services (CMS) sent a memo to the agency's Atlanta regional office stating that disabled individuals 65 and over cannot fund such trusts without incurring a transfer penalty. This position was reiterated a month later in a regional bulletin issued by CMS Region I in Boston. In the article below, Massachusetts elder law attorney Susan H. Levin provides some background on CMS's surprising new position. Following this introduction is the original CMS memo and Ms. Levin's detailed response to the agency's position in a letter to the Boston regional office.

The primary goal of the Medicaid provisions of OBRA '93 was to restrict the use of trusts and transfers of assets to qualify for Medicaid. Exempted from such restrictive treatment of so-called Medicaid Qualifying Trusts, however, were three types of trusts described in 42 U.S.C. §1396p(d)(4), all of which make some provision for the State to receive the trust assets remaining upon the death of the disabled individual. Because the State is a remainder beneficiary, the trusts are not treated as a countable asset in determining the eligibility of the Medicaid applicant. The first exempted trust is a special needs trust for a disabled individual under the age of 65 established by a parent, grandparent, guardian or court for the sole benefit of the disabled individual, as provided in (d)(4)(A). The second exempted trust is a “Miller” income trust, as provided in (d)(4)(B). The pooled trust established by a non-profit association for the sole benefit of a disabled individual, as provided in (d)(4)(C), is the third exempted trust.

OBRA '93 also imposed greater penalties for transferring assets to trusts. Exempted from the transfer-to-trust rules were assets “transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under 65 years of age who is disabled….” 42 U.S.C. §1396p(c)(2)(B)(iv).

When states were drafting regulations implementing the federal OBRA '93 changes, the question arose as to whether disabled individuals 65 and over could transfer assets without penalty to a pooled trust which was clearly non-countable pursuant to (d)(4)(C).

At that time it was recognized by the Health Care Financing Administration (HCFA), now the Centers for Medicare & Medicaid Services (CMS), that last-minute legislative drafting created many inconsistencies and omissions in OBRA '93. For example, although the three (d)(4) trusts are clearly exempted from countability rules, the drafters neglected to provide the same degree of clarity about whether all transfers to such exempted trusts should be exempted from penalty. CMS resolved the ambiguity with regard to transfers to (d)(4)(B) Miller Trusts by allowing the transfers (with certain conditions), claiming that to do otherwise would make the (d)(4)(B) provisions “a nullity.” See State Medicaid Manual §3259.7C. The majority of states in the mid-1990s

resolved the ambiguity about transfers to pooled trusts by allowing disabled individuals of any age to transfer assets without penalty to a pooled trust.

Since 1993, a significant number of non-profit associations throughout the country have created pooled trusts to serve disabled individuals. Since pooled trusts are the only type of special needs trust that can be established and funded by a disabled individual him- or herself and the only type of special needs trust that could be funded without penalty by a disabled individual age 65 and over, the number of beneficiaries enrolled in pooled trusts is considerable.

After the passage of the Deficit Reduction Act of 2005 (DRA), half-a-loaf transfer planning came to a grinding halt. Disabled individuals of modest means in need of nursing home care could no longer protect even $10,000 to pay for items or services not covered by Medicaid. The ability to transfer assets to a pooled trust became even more critical.

Emboldened by the DRA, state Medicaid agencies began to indiscriminately attack any action taken by a Medicaid applicant that resulted in the diversion of even nominal amounts of money from being expended on nursing home costs. Some states focused on disallowing personal care contracts, others on penalizing $100 birthday gifts.

The Georgia Medicaid agency took the position that disabled individuals 65 and over cannot fund a pooled trust without incurring a transfer penalty. Georgia elder law attorneys responded by mobilizing support within the Georgia legislature for a bill that would allow transfers by disabled individuals of any age to a pooled trust without penalty. After more than a year of intense advocacy, the Georgia legislature was poised to pass the bill despite objection from the state Medicaid agency.

In the meantime, an attorney for the Georgia state Medicaid agency contacted CMS for clarification of federal law. In response, a CMS memo dated April 14, 2008, from Gale Arden (Baltimore) to Jay Gavens (Atlanta Region IV) stated that "only trusts established for a disabled individual age 64 or younger are exempt from application of the transfer of assets penalty provisions (see section 1917(c)(2)(B)(iv) of the Act.)" [See memo below] At the eleventh hour, the attorney for the Georgia Medicaid agency, armed with an e-mail from CMS reflecting the position of the April 14, 2008, letter, threatened the Georgia legislature that state legislation allowing disabled individuals 65 and older to fund a pooled trust without penalty would render Georgia out of compliance with the federal Medicaid program. The legislative sponsor pulled the bill. Georgia remains bereft of the pooled trust option for its disabled seniors. Even worse, CMS has now asked all of its Regional Administrators to initiate contact with the states to make sure they are in compliance with this new interpretation of federal law.

The CMS memo appears to have been issued without careful analysis and without knowledge of state practice on this issue. For example, the CMS memo fails to acknowledge any difference between transfers by a third party (non-parent) to a pooled trust for the benefit of a 65+ disabled individual and a transfer by a 65+ disabled individual to a self-settled pooled trust for the individual's sole benefit. Transfers by a 65+ disabled individual to a self-settled pooled trust should not be subject to penalty both because such a transfer is a fair market value exchange and because the OBRA '93 transfer to trust rules do not impose a penalty when the funds placed in an irrevocable

trust can be made available to the beneficiary. Moreover, there appears to be evidence that CMS in Baltimore agreed with this conclusion in an email to the Wisconsin Medicaid agency in 2003.

On May 12, 2008, CMS Region I in Boston issued State Agency Regional Bulletin No. 2008-05 reiterating the conclusions reached by Gale Arden's group at CMS in Baltimore. Massachusetts has always allowed transfers without penalty by disabled individuals of any age to a pooled trust that meets the requirements of (d)(4)(C). The change in CMS policy rippled through the Massachusetts elder and disability advocacy community. This author presented arguments to CMS Region I against the mandatory imposition of a transfer penalty on disabled individuals 65+ who fund pooled trusts. [See letter below] Region I policy and legal staff stated in telephone conferences with this author that they found the arguments persuasive. With the hope of prompting a reconsideration of the policy enunciated in the April 14, 2008, CMS memo, Region I forwarded the author's letter on July 16, 2008, to Roy Trudel at CMS in Baltimore for review.

The Chicago Region of CMS followed Boston in July 2008 in mandating its states to begin imposing transfer penalties on disabled individuals 65+ who transfer assets to a pooled trust.

Elder law attorneys throughout the country may want to contact their CMS regional office or write directly to Herb Kuhn, Acting Director of the Center for Medicaid State Operations at CMS in Baltimore to advocate against the imposition of a transfer penalty on 65+ transfers to pooled trusts. In states that currently allow disabled individuals 65+ to transfer assets without penalty to pooled trusts, advocates may want to garner the support of state Medicaid agencies that wish to retain their current policy.

Pooled trust administrators should also contact CMS to advocate on behalf of current and future 65+ disabled beneficiaries. They will want to make sure that regardless of future changes to state regulations, current beneficiaries who are 65+ and have not yet applied for Medicaid should not be disqualified for transferring assets to a pooled trust at a time when such transfers were allowed without penalty under state Medicaid law.

It has been 15 years since the passage of OBRA '93. During this period, many states have interpreted federal Medicaid law to allow disabled individuals of any age, not only to establish such trusts, but also to fund them without penalty. Pooled trusts in many states have signed up beneficiaries based on this interpretation of federal law. CMS should not be pulling the rug out from under our 65+ disabled citizens, least of all when there is no clear legislative mandate to do so.

Susan H. Levin is a partner in the Newton, Massachusetts, law firm of Rosenberg, Freedman & Goldstein LLP, where she practices elder law. She is also the Chair of the Public Policy Committee and long-time Board member of the Massachusetts Chapter of the National Academy of Elder Law Attorneys.

CMS Memo From Gale Arden (Baltimore) to Jay Gavens (Atlanta Region IV)

Center for Medicaid and State Operations
Disabled and Elderly Health Programs Group (DEHPG)

Date: April 14, 2008

To: Jay Gavens, Acting Associate Regional Administrator
Division of Medicaid and Children's Health

From: Gale P. Arden /s/
Director

Subject: Pooled Trusts

Recently, an issue regarding pooled trusts and the imposition of a transfer penalty under Medicaid has surfaced in Georgia. In the course of assisting the Georgia State Medicaid agency in responding to a proposed initiative in the Georgia legislature, it was brought to our attention that in many States within Region IV, individuals age 65 and older are establishing pooled trusts, but the States may not be applying the transfer of assets penalty provisions as required by statute.

A pooled trust is a trust that can be established for a disabled individual under the authority of section 1917(d)(4)(C) of the Social Security Act (the Act). A trust that meets the requirements of this section of the statute is exempt from being treated under the normal Medicaid trust rules in section 1917(d) of the Act. A pooled trust is run by a non-profit organization. The trust (or more accurately, a sub-account within the trust) is established for each individual beneficiary. All the beneficiary sub-accounts are pooled for investment and management purposes. Upon the death of the disabled individual, the balance remaining in the account is paid back to the State Medicaid agency in an amount equal to the medical assistance paid on behalf of the beneficiary. The statute also allows the trust to retain some portion of the balance remaining after the death of the beneficiary.

Although a pooled trust may be established for beneficiaries of any age, funds placed in a pooled trust established for an individual age 65 or older may be subject to penalty as a transfer of assets for less than fair market value. When a person places funds in a trust, the person gives up ownership of those funds. Since the individual generally does not receive anything of comparable value in return, placing funds in a trust is usually a transfer for less than fair market value. The statute does provide an exception to imposing a transfer penalty for funds that are placed in a trust established for a disabled individual. However, only trusts established for a disabled individual age 64 or younger are exempt from application of the transfer of assets penalty provisions (see section 1917(c)(2)(B)(iv) of the Act).

If States are allowing individuals age 65 or older to establish pooled trusts without applying the transfer of assets provisions, they are not in compliance with the statute. As explained above, federal statute requires the application of the transfer rules in this situation; it not a decision for each State to make.

According to the Georgia legislator who contacted our office, many if not most of the States in your region may have elected not to apply the transfer of assets provisions as outlined above in situations where a pooled trust is established for someone age 65 or older. Based on the information we received, we are asking you to initiate contact with the States in your region to determine whether they are out of compliance with the requirements of the Medicaid statute. If a State is not applying the provisions, please work with the State to come into compliance. The eligibility staff in my office is ready and willing to assist you in this effort. They are available to participate in conference calls with the states or the region, as necessary.

I am providing a copy of this memorandum to the other CMS Regional Offices so that they can refresh staff's understanding on this transfer of assets policy.

Cc: Associate Regional Administrators
Division of Medicaid and Children's Health
Regions I-III, V-X

Letter of Susan H. Levin to Allen Bryan, CMS Region I

June 20, 2008

Allen Bryan
Department of Health and Human Services
JFK Federal Building, Government Center
Room 2275
Boston, MA 02203

Re: State Agency Regional Bulletin 2008-05

Dear Mr. Bryan,

I am writing on behalf of the Public Policy Committee of the Massachusetts Chapter of the National Academy of Elder Law Attorneys about the recent State Agency Regional Bulletin No. 2008-05 that your office issued to Medicaid state agencies on May 12, 2008, stating that "A pooled trust established by an individual age 65 and older is not exempt from the transfer of assets provisions."

We were surprised to learn of CMS' position on an issue that has been interpreted in a contrary fashion by the majority of states since the Medicaid trust and transfer rules were transformed by OBRA-93. We believe the new interpretation that CMS has summarily adopted is not required by federal Medicaid law, violates the Americans with Disabilities Act and implementing regulations, and constitutes bad public policy.

1. CMS should interpret inconsistent provisions of federal Medicaid law to allow disabled individuals of any age to establish and fund pooled trusts.

There is no question that pooled trusts can be used to hold assets of a disabled individual who is over 65 as long as the trust meets the requirements of OBRA-93. The issue is whether a transfer disqualification should be imposed if an individual over age 65 transfers assets to a pooled trust. It was the clear intent of Congress to carve out an exception for the exempt (d)(4) disability trusts. Due to the last minute drafting process involving these provisions, errors and omissions were made. We believe that all of the (d)(4) trusts were intended to be exempt from transfer rules as well as income and resource availability rules.

For example, there is no express exemption from the transfer rules for Miller trusts pursuant to 42 U.S.C. §1396p(d)(4)(B). Yet it was clear to most states having an income cap that this was due to an error of drafting. The states looked to HCFA for clarification. As a result, in a memorandum about Miller trusts, dated March 17, 1994, Sally K. Richardson, Director of Medicaid Bureau for HCFA, stated:

"We believe that the conflicting provisions …could render the Miller trust exemption in section 1917(d)(4(B) a nullity. That is, while section 1917(d)(4)(B) clearly attempts to except certain trusts from being counted as available income or resources under the Medicaid program, ….the transfer rules require a transfer penalty.

In order to resolve this conflict in the law, and to avoid interpreting a provision of the statute as a nullity, we believe that we must give precedence to section 1917(d)(4)(B)….. Congress clearly intended that individuals in "cap" states who need institutional care should be able to shelter income so that they can receive that care. Therefore, transfer of assets penalties will not apply to income placed in a Miller trust, ..."

Ms. Richardson reached this logical conclusion despite the ambiguity in the federal law.

The same argument can be applied to transfers to pooled trusts. Unlike (d)(4)(a) trusts which are limited to "an individual under age 65 who is disabled," (d)(4)(c) pooled trusts may "contain the assets of an individual who is disabled" with no age limit. It is illogical for Congress to have exempted the assets in a qualified pooled trust from countability regardless of the age of the disabled individual, but penalize the transfer of assets to such a trust. It would work a severe hardship upon those Medicaid recipients who are 65 and older who are among the intended beneficiaries of the pooled trust arrangement to impose a transfer penalty on transfers to pooled trusts.

Indeed, HCFA Transmittal 64 recognized the tension between the trust and transfer provisions of OBRA-93 and specifically states in §3259.6 G., "Because the trust provisions are more specific and detailed in their requirements for dealing with funds placed in a trust, the trust provisions are given precedence in dealing with assets placed in trusts."

Like with transfers to Miller Trusts, CMS should be interpreting the

inconsistencies and ambiguities in federal law to further the goal of protecting disabled persons, regardless of age.

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2. Even if CMS concludes that transfers by individuals 65 and over to pooled trusts are not included in the transfer of asset exception otherwise applicable to individuals under age 65, such transfers are not disqualifying under federal law.

The State Medicaid Manual § 3259.6A-C, as amended by HCFA Transmittal No. 64 (November 1994) contains detailed provisions describing when the funding of a trust constitutes a disqualifying transfer. The Manual divides the trust universe into three parts: revocable trusts; irrevocable trusts from which payment could under some circumstances be made to the individual; and irrevocable trusts from which payment could not under any circumstances be made to the individual.

The funding of a revocable trust does not trigger a transfer penalty, and the trust corpus is treated as a fully countable asset available to the individual. State Medicaid Manual § 3259.6A, as amended by HCFA Transmittal No. 64 (November 1994). A transfer to an irrevocable trust under which payments could still be made to the individual is not treated as a Medicaid-disqualifying transfer, and once again the trust corpus is treated as a countable asset available to the individual. State Medicaid Manual § 3259.6B, as amended by HCFA Transmittal No. 64 (November 1994). Only a transfer to the third type of trust, an irrevocable trust from which payments cannot under any circumstances be made to the individual establishing it, triggers a Medicaid penalty period. State Medicaid Manual § 3259.6C, as amended by HCFA Transmittal No. 64 (November 1994). This treatment of transfers to trusts was confirmed in a letter dated February 25, 1998, from Robert A. Streimer, Director, Disabled and Elderly Health Programs Group, HCFA to Attorney Dana E. Rozansky.

A pooled trust is an irrevocable trust under which payments can still be made to the individual establishing it. Indeed, in compliance with the “sole benefit” requirement enunciated elsewhere in the State Medicaid Manual, see State Medicaid Manual § 3257.B.6, as amended by HCFA Transmittal No. 64 (November 1994), all pooled trusts must provide that the disabled person establishing the account be the sole lifetime beneficiary. Therefore, even if the funding of a pooled trust is not subject to the transfer of asset exception for individuals under 65, under the rules governing trusts and transfers in the State Medicaid Manual, the funding of a pooled trust by a disabled person age 65 or over should not trigger a disqualifying penalty.

3. An individual who funds a pooled trust for his sole benefit during his lifetime has not made a disqualifying transfer because the individual has received fair market value for the transfer.

To satisfy the federal requirements of a qualified pooled trust under section 1917(d)(4)(C), a separate account must be maintained for each disabled beneficiary of the trust and the resources in the account must be used solely for the benefit of the disabled individual. The pooled trust must use the resources to purchase items and services for fair market value, which are for the sole benefit of the disabled individual. It is therefore difficult to see this transaction as a gift. The disabled

beneficiary, while transferring legal ownership in return for equitable ownership, does receive the benefit of the goods and services purchased by the trust.

In the Miller Trust context, Sally Richardson explained that "to the extent that the trust instrument provides that the income placed in the trust will, in turn, be paid out of the trust for the medical care, …. provided to the individual….the individual is considered to have received fair market value for the income placed in the trust…." (See Letter dated May 25, 1994, from Sally Richardson to HCFA Regional Offices.) If HCFA could conclude that transfers to (d)(4(B) Miller trusts are fair market value transfers, CMS can conclude that transfers to (d)(4)(C) trusts are also fair market value transfers.

4. Imposing a transfer of asset penalty on disabled individuals age 65 and older but not on disabled individuals under 65 violates the Americans with Disabilities Act (ADA), 42 U.S.C.§12101 et seq. The ADA is designed to eliminate discrimination against individuals with disabilities. Regulations implementing the public services title of the ADA, provide that a public entity in providing any aid, benefit or service, may not directly or indirectly "… provide different or separate aids, benefits or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others…." 28 C.F.R. §35.130(b)(1)(iv).

By allowing disabled individuals under age 65 to fund pooled trusts without penalty but penalizing those 65 and over who fund pooled trusts, CMS is discriminating against a class of individuals with disabilities. One of the purposes of funding a pooled trust is to set aside funds to pay for items or services not covered by Medicaid that can improve the quality of life of a disabled person. For example, pooled trusts commonly pay for dental care and companion services for nursing facility residents. No legitimate purpose exists for allowing a 64-year old disabled individual to make provision for future dental services, but not allow a 65-year old disabled individual to do likewise.

This was the argument put forth by the plaintiffs in a class action filed in federal district court in 2000, challenging the application of more stringent financial eligibility criteria to those disabled individuals 65 and older than was applied to those under 65, in the provision of personal care attendant services. The Commonwealth settled the case and agreed to apply the same eligibility criteria to all regardless of age. See Hermanson v. Commonwealth of Massachusetts, Civil Action No. 00-CV-30156MAP.

By denying disabled elders 65 and over in nursing homes the ability to set aside funds in a pooled trust and still qualify for Medicaid, CMS is providing different or separate benefits or services to the class of elder individuals with disabilities in violation of §35.130(b)(1)(iv) and otherwise limiting elder disabled individuals in their enjoyment of the advantages and opportunities enjoyed other disabled individuals in contravention of §35.130(b)(1)(vii).

Another primary purpose of funding a pooled trust is to permit a disabled individual to set aside funds that could be used to enable him or her to return to the community. If an individual spends her assets down to $2,000 (or the

applicable asset limit for a single individual) and qualifies for Medicaid coverage of nursing home care, but is later able to return home with assistance, he or she will lack the means to accomplish such a move. Retaining funds in a pooled trusts enables a disabled individual to retain the option of returning home.

Most of the new government funding for elders is now focused on assisting elders to receive care at home. In many states, efforts are being implemented to medically screen nursing home residents more stringently to determine if any are able to return home with assistance. It is thus all the more important that individuals who are placed in nursing facilities retain some financial means to make the transition from nursing home to home. Transferring assets to a pooled trust is the only way a disabled individual 65 or older who must qualify for Medicaid coverage of nursing home care can set aside funds to retain the option of returning home.

The ADA requires the states to provide services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. §35.130(d). In Olmstead v. L.C., 527 U.S. 581, 591-592, 119 S.Ct. 2176, 2182-83 (1999), the Supreme Court considered this integration mandate regulation and concluded that it was required by the underlying purpose of the ADA, stating, "that unjustified institutional isolation of persons with disabilities is a form of discrimination …" Olmstead, 527 U.S. at 600, 119 S.Ct. at 2187. In light of the integration mandate, CMS should be interpreting these conflicting Medicaid provisions in a manner that will facilitate the ability of all disabled individuals, regardless of age, to return to the community.

By foreclosing the opportunity for those 65 and over to set aside funds in a pooled trust, CMS is discriminating against a sub-class of disabled individuals and making it difficult for this sub-class to receive care in a community setting once having received nursing home care.

5. There is sufficient ambiguity in the federal statute that CMS at a minimum should allow the states discretion on whether to impose a transfer of asset penalty on individuals 65 and older who transfer their assets to a pooled trust.

We recognize that the federal statute on the establishment and funding of trusts for disabled individuals age 65 and older is contradictory and ambiguous. Faced with this ambiguity in the federal law, many states chose to reconcile the conflicting provisions of the statute in a way that would facilitate the original statutory intent of protecting disabled individuals. The majority of states chose to allow transfers by disabled individuals of any age to pooled trusts. In the past, when federal Medicaid law has been ambiguous, yielding conflicting interpretations throughout the country, CMS has left to the states the option of choosing which interpretation to adopt.

For example, when the States differed on the methodology to use to raise the community spouse resource allowance, income-first or resources-first, CMS concluded that the statute did not require or foreclose either method. Instead, CMS used its rulemaking authority under section 1902(a)(17) of the Act to leave the choice of method to the States, explaining that the statute "contemplates that different States may establish different standards for determining eligibility, so long as all are 'reasonable' and all are consistent with the Act and our regulations." See 66 Fed. Reg. 46763, 46767

(2001); HCFA, Chicago Regional State Letter No. 22—94, at 2, App. to Pet. for Cert. 89a.14. In its proposed regulation, the Secretary of Health and Human Services declared that "in the spirit of Federalism," the Federal Government "should leave to States the decision as to which alternative [income-first or resources-first] to use." 66 Fed. Reg. 46763, 46767 (2001). The U.S. Supreme Court, in Wisconsin Dept. of Health and Family Servs. v. Blumer, 534 U.S. 473 (2002), 2000 WI App. 150, 237 Wis. 2d 810, 615 N.W. 2d 647, affirmed that both methodologies were permitted under the Act and that the Secretary had the authority to leave it to the States to decide which methodology to adopt in implementing the Act.

Like the income/resource-first methodology dispute prior to the Deficit Reduction Act of 2005, the federal statute regarding pooled trust funding is subject to two interpretations. At a minimum, CMS should leave to the States the decision as to which way to interpret the federal statute.

For the foregoing reasons, we urge you to reconsider the policy you have communicated to the States and in the meantime, absolve the States from the need to comply with your Bulletin dated May 12, 2008. The interpretation of these ambiguous statutory provisions has important legal and policy implications that deserve careful consideration.

We look forward to continuing to discuss these issues with you.

Sincerely yours,

Susan H. Levin