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New Restrictive Rule Regarding Medicaid and Power of Attorney

In his Elder Law column, Daniel Fish discusses a new rule that requires local Medicaid offices to reject enrollment in a pooled income trust made under a power of attorney lacking a statutory gift rider. The rule will have the effect of causing unnecessary nursing home placements, and the legal basis for the directive is highly questionable.

By **Daniel G. Fish** | August 15, 2019



Daniel G. Fish

The New York State Department of Health has recently issued a policy instruction (GIS 19 MA/04) to all local Medicaid offices that will have the effect of causing unnecessary nursing home placements. The new rule requires the local Medicaid agency to reject enrollment in a pooled income trust made under a power of attorney lacking a statutory gift rider. The legal basis for the directive is highly questionable.

Pooled Income Trust

The Medicaid home care program restricts the amount of monthly income that an applicant may retain. Any monthly income above \$859 is considered surplus income. To maintain Medicaid eligibility, the applicant is required to spend down the surplus income on medical care. The surplus can be spent down only on medical expenses and not on ordinary living expenses. Seniors who cannot cover living expenses such as rent, food, clothing and utilities using just \$859 per month are forced into nursing homes. The use of the pooled income trust enables the applicant to remain in the community rather than an unnecessary nursing home placement. Instead of spending the surplus income on medical expenses, the applicant is permitted to send the surplus income to a pooled income trust which can use the surplus income pay the non-medical living expenses of the individual. The Medicaid home care applicant maintains eligibility because surplus income that is sent to the pooled income trust is disregarded by Medicaid.

The pooled income trust is administered by a not-for-profit entity. It creates a master trust. The Medicaid applicant enrolls in the master trust trust by signing a joinder agreement. The applicant then sends the surplus income each month to their own separately maintained sub-trust account. The applicant also submits bills to the trust for ordinary living expenses. In its simplest form, the applicant can charge these expenses on a credit card and then submit the credit card invoice to the pooled income trust. The trust is required to use the applicant's money to pay

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bills in the name of the applicant. The trust can only make payments from the amount held in the sub-trust account for that specific individual. This principle is exemplified in the master trust of one of the pooled income trust entities:

“The property of each Beneficiary who contributes property and establishes a Trust sub-account shall be held in trust for the sole benefit of such Beneficiary and shall be held, managed, invested, and reinvested by the Trustee, who shall collect the income therefrom and, after deducting all charges and expenses properly attributable thereto, shall, at any time and from time to time, apply for the sole benefit of each such Beneficiary, so much (even to the extent of the whole) the net income and/or principal of the Trust sub- account as the Trustee shall deem advisable ...”

Many Medicaid applicants are elderly and can no longer sign the enrollment forms themselves. Some rely upon an agent under a power of attorney to sign the enrollment forms. The new rule requires that the power of attorney include a statutory gifts rider.

GIS 19 MA/04

The New York State Department of Health communicates with local Medicaid offices by use of directives, called General Information System (GIS). GIS 19 MA/04 is entitled “Clarification of Policy for Treatment of Income Placed in Medicaid Exception Trusts” and contains the following directive: “Note: If a trust is established by an agent acting under a power of attorney (POA), the powers granted under the POA must include permission to gift assets.”

New York City Medicaid took the same position in a July 26, 2017 Medicaid Alert:

“Furthermore, the New York Statutory Short Form Power of Attorney (NYSPOA) may only be used to establish a trust, if section (h) of the NYSPOA is initialed and if a Statutory Gifts Rider (SGR) is also signed and witnessed by two persons, who are not named in the SGR as permissible recipients of gifts, at the same time as the referencing NYSPOA. The SGR must meet the requirements of General

Obligations Law § 5-1514. All trusts signed by an agent with authority under a NYSPOA must also be accompanied by a properly executed SGR to be considered valid for Medicaid eligibility purposes.”

New York City Medicaid followed up on June 25, 2018 with a Medicaid Alert stating that applications without a statutory gifts rider would be deferred, not denied, to give the applicant the opportunity to submit a new power of attorney.

This fails to take into account the fact that many applicants due to their age and illness are unable to execute a new POA.

Definition of a Gift

“To make a valid inter vivos gift the donor must intend to make an irrevocable present transfer of ownership, there must be delivery of the gift, either by physical delivery of the subject of the gift or a constructive or symbolic delivery, and there must be acceptance by the donee.” *Estate of Partos*, 578 N.Y.S.2d 30 (2d Dep’t 1994).

However, the Medicaid applicant is not making an irrevocable present transfer of ownership. In fact, the purpose of the pooled income trust is not to give money away; it is to preserve it for the Medicaid applicant. The pooled income trust is only permitted to make payments of the funds that the applicant has deposited for the sole benefit of the Medicaid applicant. There is no delivery of the subject of the gift because the Medicaid applicant is directing the pooled income trust to use the funds to pay his or her expenses. There is no acceptance by the donee as the pooled income trust hold the funds of the Medicaid applicant for the sole benefit of the applicant.

The Medicaid applicant is not making any gift when his or her excess income is sent to the pooled income trust. The applicant is simply having a third party use the applicant’s funds to pay his or her bills. There must be an unambiguous intent on the part of the donor to make a gift. There must be a relinquishment of dominion and control. Neither of these is present when a Medicaid applicant enrolls in a pooled income trust.

Power of Attorney

To protect seniors from financial exploitation, General Obligations Law §5-1514 requires that the principal specifically authorize the agent to make gifts above \$500 per year by means of a statutory gifts rider. This provision was enacted to protect vulnerable seniors from financial exploitation. This statute is not applicable where the agent is not making a gift of the principal's assets. The signing of a form to enroll in a pooled income trust, by an agent under a power of attorney, is not the equivalent of a gift. It is perverse that a statute intended to protect vulnerable elderly is being used against them.

Conclusion

The enrollment of a Medicaid applicant in a pooled income trust, by an agent under a power of attorney, is characterized by Medicaid as a gift, requiring statutory gift rider authority. No justification or case law or statutory authority is offered by Medicaid for this position. The New York State Department of Health should issue a new directive stating that the statutory gifts rider is not required for enrollment in a pooled income trust.

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