

THE OUT-OF-STATE FORMER HOME: HOW MARYLAND WAS PERSUADED TO CHANGE ITS POLICY

By Ron M. Landsman

States that strictly apply the SSI rule regarding the treatment of former homes appear to put some long-term care residents in a "Catch-22" quandary. A Medicaid applicant's former home in another state can be excluded as an available resource only so long as the individual intends to return to the home (20 C.F.R. §416.1212(c)). But that very intent seems to exclude what appears to be required for the resident in the new state to obtain Medicaid benefits there—presence in the new state combined with an intent to remain permanently or for an indefinite period of time (42 C.F.R. §435.403(i)(4)). In other words, the intent required to qualify for Medicaid benefits in the new state may preclude the intent necessary to continue exclusion of the former home in the other state.

In fact, the two requirements are easily reconciled on their face. The requirement for residence in a state is satisfied by presence in the state plus intent to remain there for an "indefinite period of time," while the home exclusion (not domicile in the other state) should rest only on an intent to return "sometime in the future."

Nonetheless, for many years the Maryland Medicaid program absolutely prohibited the exclusion of out-of-state former home property. It viewed the intent to return to a former home as inconsistent with the intent to remain in Maryland for, *inter alia*, an indefinite period of time. This was particularly pernicious in Maryland, which is part of a three-state area and has many nursing home residents whose home was in the District of Columbia or who moved to a Maryland facility to be near children who work in the region.

Maryland reversed its policy in 1995 in response to correspondence reviewing the administrative history of feder-

al policy respecting establishing residence. In the 1970s, the Health Care Financing Administration (HCFA) used its rule-making power to establish national policy favoring residence where a person was physically present, barring compelling reasons to the contrary. To be sure, Maryland may well have calculated the cost of compliance and concluded it would be tolerable: it already liened former homes and could in theory recover all that it paid for that person's care up to the full value of the house.

The Elderlaw Report ran an item on the new policy, but otherwise the change went unheralded. (See "Maryland Medicaid Agrees to Exclude Out-of-State Former Homes," Vol. VII, No. 2, September 1995, page 5.) When this practitioner was working on a complicated plan involving a client's move to one of three states, it turned out that South Carolina continues to follow this outmoded practice. Since federal law appears to prohibit such a policy, the original letter that persuaded Maryland to back off—without admitting error—might be of use to others. The letter, by this writer, follows in its entirety.

May 17, 1995

Hon. Martin Wasserman, Secretary
Department of Health and Mental Hygiene
201 West Preston Street
Baltimore, Maryland 21201

Hon. J. Joseph Curran, Attorney General
Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202

Re: Denial of resident status under the Medicaid program for individuals intending to remain in Maryland indefinitely

Dear Messrs. Wasserman and Curran:

I am writing on behalf of Samuel N——, who resides at the Hebrew Home of Greater Washington in Rockville, Maryland, and as her former conservator, on behalf of Melba Reid, who until her death resided at Gladys Spellman Nursing Center, Cheverly, Maryland, to ask that you bring the Maryland Medicaid program into compliance with specific Federal law respecting residence for purposes of eligibility for Medical Assistance.

The precise problem is that Maryland denies residence status to an individual who intends to remain in Maryland for an indefinite period of time if he or she owns a home

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Westmoreland Takes Medicaid Post

Timothy M. Westmoreland has replaced Sally Richardson as the director of the Center for Medicaid State Operations in the Health Care Financing Administration. Westmoreland is viewed as a Washington insider and a liberal with a broad background in public health and a particular expertise on how the Medicaid program has shaped HIV/AIDS policy. During the 1980s and early 1990s, he was a health staffer and counsel to the House Commerce Health & Environment Subcommittee chaired by Rep. Henry Waxman (D-CA). Most recently, he divided his time between the Georgetown University Law Center and the Kaiser Family Foundation.

in another state and intends (or for whom a representative has stated an intent) to return sometime to that former home. The Maryland Medicaid Manual directs caseworkers to deny eligibility on grounds of lack of residence for such individuals because they "cannot simultaneously intend to permanently reside in Maryland and intend to resume residency in another state." Page 800-19 (emphasis added).

This requirement that a person cannot be a resident of Maryland unless he or she intends to remain here permanently violates the Federal statute and regulations governing the Medicaid program. It would also appear to violate the equal protection clause and the Fifth and Fourteenth Amendments to the Constitution by infringing on the right to interstate travel, establishing an irrebuttable presumption with respect to residence, and treating like individuals differently. Accordingly, I ask that you amend the Manual to bring it into compliance with Federal law and direct the local departments to reconsider a denial of eligibility for Mr. N—— consistent with those changes, and to apply the correct rule for Mrs. Reid, for whom a decision is overdue.

Background. Melba L. Reid. Mrs. Reid, a natural born citizen of the United States, moved to Maryland on or about December 28, 1994. She was living at 1408 Kearney Street, N.E., Washington, D.C. 20017, which she owned, on October 17, 1994, when she was admitted to Providence Hospital for treatment of acute pneumonia.

While there, she suffered further neurological loss relating to Alzheimer's Disease, so that she could no longer breathe without mechanical assistance. She was discharged to Gladys Spellman Nursing and Rehabilitation Center, located at 2900 Mercy Lane, Cheverly, Maryland 20785, on or about December 28, 1994. Her guardian, Sylvia Simmons, who is herself a Maryland resident, elected Gladys Spellman because of its ability to manage a patient requiring chronic pulmonary support (one of only three in the greater Washington area), because of its reputation for quality of services, and because of its proximity to Mrs. Reid's relatives and friends.

At the time of her admission, Mrs. Reid's remaining resources consisted of her former home, a small amount of cash, and potential causes of action. As Mrs. Reid's court-appointed conservator, I promptly filed with the Prince George's County Department of Social Services (the PGC DSS or local department) an application for Maryland Medicaid long term care benefits. On the application, I stated that it was my intent that Mrs. Reid reside in Maryland for an indefinite period of time, but that I also intended that she ultimately return to her former home in the District of Columbia at some time. Mrs. Reid herself lacked the capacity to form an intent with respect to her residence.

The local department has failed to issue a notice with

respect to Mrs. Reid; I anticipate that an appeal will be filed when a personal representative is appointed; the PGC DSS typically fails to issue notices until after we seek a hearing for failure to make a timely determination.

Samuel N——. Mr. N——, 76, a naturalized citizen of the United States, moved to Maryland on or about August 8, 1993. Prior to that time, he lived at a private residence located at 27 S. Aberdeen Place, Atlantic City, New Jersey, which he continues to own. Because of his poor health—he is blind and suffers from insulin-dependent diabetes mellitus and an early stage of multi-infarct dementia—and the fact that two of his three adult children live in Montgomery County, Maryland, they arranged for his admission to the Hebrew Home of Greater Washington, which occurred on or about August 8, 1993. Mr. N——, through me as his designated representative, filed with the Montgomery County Department of Social Services (the MC DSS or local department) an application for long term benefits under the Maryland Medicaid program. On the application, Mr. N—— through his representative stated his intent to remain at the Hebrew Home so long as his medical status required care in a nursing home, but that he also intended to return to his former home in the State of New Jersey.

The local department has issued a notice denying eligibility to Mr. N—— on the ground that he was not a resident, stating, "You have signed (by legal representation) the intent to return to home property, located in New Jersey." A copy of this notice is enclosed.

Mr. N—— and Mrs. Reid sought no more than what every other resident of Maryland is entitled to: eligibility in the Maryland Medicaid program, once all other requirements are met, with their former homes subject to lien, to be enforced if they do not return to it, or a claim for recovery out of their probate estates, pursuant to COMAR _ 10.09.24.15(A-2)(2) and (A-3)(1)(a) and (b), respectively.

Discussion. Congress has restricted the states from denying residence status to individuals in a variety of ways, the most familiar perhaps being the elimination of duration of residence requirements. Indeed, such requirements are invalid under the U.S. Constitution, absent a compelling state interest, as a violation of the right to interstate travel and to equal protection of the laws.

Maryland has been required in prior litigation to discontinue denial of benefits under State law because of these violations of fundamental Federal principles. In the present cases, as well, narrow and precise Federal law directs Maryland not to deny residence status to individuals such as Mr. N—— and Mrs. Reid.

Federal statute. Congress directed the States not to use permanence as an element of their residence requirements when it amended Section 1902(b) of the Social Security Act, codified at 42 U.S.C. §1396a(b)(2), in 1986 as part of that year's Omnibus Budget Reconciliation Act. In that

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new subsection, Congress provided that no State plan could impose as a condition of eligibility "any residence requirement which excludes any individual who resides in the State, regardless of whether or not the residence is maintained permanently" The particular problem presented was some States' failure to provide benefits to the homeless, but Congress wrote broadly in precluding any requirement of permanent residence.

It is difficult to see how Mr. N—— can be less of a resident of Maryland than a homeless person where Mr. N—— is in—and intends to remain in—a Maryland facility for an indefinite period.

Regulatory action by the administrative agency. The Health Care Financing Administration has long provided by regulation that states "may not impose any eligibility requirement that is prohibited under Title XIX" 42 C.F.R. §435.401(a). Thus, the State Plan prohibition in §1396a(b)(2) cannot be avoided by putting the prohibited requirement in as an instruction to caseworkers in the Manual without specification in the State Plan.

But long before the statutory provision was added, since October 15, 1979, HCFA has directed the states to treat as a resident every institutionalized individual over age 21, subject to exceptions not applicable here. For the institutionalized adult who lost capacity at or after age 21, "the State of residence is the State in which the individual is physically present" 42 C.F.R. §435.403(i)(3). For all other adults, including the institutionalized adult who has capacity, "the State of residence is the State where the individual is living with the intention to remain there permanently or for an indefinite period of time." 42 C.F.R. §435.405(i)(4)(emphasis added). HCFA's model "State Medicaid Manual" [SMM] restates the provisions just noted, SMM §3230.2(D), followed by a list of specific prohibitions including "[d]eny[ing] Medicaid eligibility to an otherwise qualified resident of the State because the individual's residence is not maintained permanently" SMM §3230.3A (copy attached).

HCFA's purpose in promulgating this regulation was to provide "more specific rules ... to ensure that no otherwise eligible individual is denied Medicaid because no State recognizes him as a resident," that is, where someone "finds himself without any State of residence for Medicaid purposes ..." It also wanted to protect citizens' "constitutional right to travel freely among States."

The phrase "intention to remain permanently or for an indefinite period" was consistent with longstanding case law respecting residence, indeed including Maryland common law on domicile.

Maryland's prohibition against finding residence for individuals such as Mr. N—— and Mrs. Reid plainly runs afoul of HCFA's stated purpose, as well as the specific proscriptions. If New Jersey had regulations such as Maryland's, for example, Mr. N—— would be unable to

qualify there, either, since his intent "to remain ... for an indefinite period of time" in "the state [Maryland] in which he is living" would preclude his qualifying for benefits in New Jersey. See COMAR §10.09.24.05(B)(6)(g).

Similarly, if the District of Columbia had the same regulation, Mrs. Reid would be denied benefits there, as well. An intent to return to a former home in Maryland would be sufficient to establish Maryland residence for eligibility purposes under these rules.

HCFA's preclusion of this permanent residence requirement commands deference, as the Department's counsel has argued elsewhere. *In re McGhee*, OAH Case No. 94-DHMH-PG-10-416953, Memorandum of Law in Support of [DHMH]'s Response to William McGhee's Motion for Summary Decision [etc.], p. 6. Such violations of the requirements of Federal law under the Medicaid program would entitle Mr. N—— and Mrs. Reid and others similarly situated to relief. *Fabula v. Buck*, 598 F.2d 869 (4th Cir. 1979).

Federal constitutional issues. The denial of residence status for eligibility purposes to Mr. N—— and Mrs. Reid runs afoul of at least three Constitutional rights. Absent the lack of countervailing interests, already litigated in the public benefits context, it violates the Constitutional right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969). The mandated conclusion that Mr. N—— cannot have the requisite intent to be a resident because he also intends, ultimately, to return to a former abode is an irrebuttable presumption that violates the due process clause, *Vlandis v. Kline*, 412 U.S. 441 (1973). And the different treatment of individuals with former homes in and outside Maryland violates the equal protection clause, *Moreno v. Toll*, 489 F. Supp. 658 (D. Md. 1980).

The victims of such violations are entitled to relief. See *Moreno v. University of Maryland*, 420 F.Supp. 541 (D. Md. 1976), aff'd, 556 F.2d 573 (4th Cir. 1977), aff'd in part sub nom. *Elkins v. Moreno*, 435 U.S. 647 (1978).

State common law of residence. The *Moreno* cases involved protracted litigation over the University of Maryland's rule that a person in the United States under a G-4 visa could not establish residence because they might—sometime—return to a former residence outside the United States. Most apposite is the decision of the Court of Appeals in *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979), on certification of a question from the Supreme Court, where the Court of Appeals held that someone without permanent resident alien status could still have the fixed abode and intent to remain indefinitely that, together, conclusively establish domicile under Maryland law. 284 Md. at 443. For all of the many differences, the issue there is strikingly similar to the prohibition against establishing residence involved in this case. There, as here, the state sought to deny a finding of residence status notwithstanding the intent to remain

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here for an indefinite period by, in essence, requiring the intent to remain permanently, and its rule was accordingly struck down.

Conclusion. The appropriate remedy at this stage is for the Department to delete the Manual provision that directs a finding that an individual with an out-of-State home to which he or she intends to return is not a resident, and to replace it with directions to eligibility workers that where an applicant intends to remain in Maryland for an indefinite period, or lacking the incapacity for intent, is physically located in Maryland, he or she is a resident. The local

departments should then be directed to review the determination for Mr. N——, and to make a determination for Mrs. Reid, in light of this corrected policy.

Yours truly,

Ron M. Landsman

Enclosures:

1. [—————]
2. Health Care Financing Administration, State Medicaid Manual, _ 3230.3A, page 3-3-58.

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KEEPING CURRENT

Wisc. Court Holds That Spouse's IRA Is Not a Countable Resource

ELR 00-3 *Keip v. Wisc. Dept. of Health and Family Services* (Wisc. Ct. App., No. 99-019399-0193, Dec. 23, 1999). Wisconsin's Court of Appeals rules that an IRA owned by a community spouse is not a countable resource to determine the institutionalized spouse's Medicaid eligibility.

When Caryl Keip retired in September, 1996, she rolled her employee pension into an IRA. On April 23, 1997, Caryl's husband, Walter, entered a nursing home, where he remained until his death in December 1997. In June 1997, Mrs. Keip applied for Medicaid on Mr. Keip's behalf. After learning that the Wisconsin Department of Health and Family Services intended to count her IRA as an asset in determining her husband's eligibility for Medicaid, thus rendering him ineligible, Mrs. Keip used about half the IRA funds (approximately \$80,000) to purchase an irrevocable fixed income annuity. Mr. Keip qualified for Medicaid as of August 1997, but the Department denied him benefits prior to that month. The Keips challenged the denial of Medicaid benefits prior to August 1, 1997, arguing that the IRA should not have been considered a countable resource. Although the hearing examiner's proposed decision supported the Keips' position, the Department's Final Decision was that the IRA was a countable resource under the "spousal impoverishment provisions" of federal law. 42 U.S.C. §1396r-5(a)(3). A circuit court upheld the administrative determination, and Mrs. Keip appealed again.

In her appeal, Mrs. Keip pointed to the federal requirement that the methodology to be employed by Wisconsin's Medicaid program in determining income and asset eligibility for the aged, blind, and disabled can be no more restrictive than that used in the federal Supplemental Security Income (SSI) program. See 42 U.S.C. §1396a(r)(2)(A)(i) (1994). The federal SSI requirements, in turn, exclude from consideration as a countable resource "pension funds" held by a spouse who is living with the

applicant. The Department countered that the resource exclusions contained in the federal spousal impoverishment provisions enacted in 1988 supplant the resource exclusions applicable in SSI eligibility determinations.

The State of Wisconsin's Court of Appeals, an intermediate appellate court with statewide jurisdiction, reverses, ruling that Mrs. Keip's IRA is not countable as a resource. Concluding that the relevant provisions of the spousal impoverishment law are ambiguous as to whether they supersede SSI regulations on this score, the court looks to congressional intent in enacting the spousal impoverishment provisions. In its review, the court finds that Congress did not intend for community spouses to spend down pension funds or IRAs in order to render their institutionalized spouses eligible for Medicaid. "[I]t seems clear," the court writes, "that congressional intent was to preserve existing exclusions, while increasing the amount of assets a community spouse may retain." In its ruling, the court rejects the reasoning of the New Jersey Supreme Court in *Mistrick v. Division of Medical Assistance*, 712 A.2d 188 (N.J. 1998) that reading the spousal impoverishment provisions as superseding the earlier provisions helps close a loophole allowing couples to shelter assets by putting them in the name of the community spouse. (See "N.J. Supreme Court Holds Community Spouse's IRA Is a Countable Resource," *The ElderLaw Report*, Vol. X, Nos. 1/2, September 1998, page 8.) "We fail to see," the court writes, "how eliminating the exclusion for a spouse's pension or IRA, an exclusion that was explicitly recognized under SSI/MA eligibility rules prior to enactment of the spousal impoverishment provisions, assists in 'closing a loophole' exploited by asset transfers between spouses. Employee pension funds and IRAs are not readily transferable between spouses. They are thus not the type of assets that could easily be retitled on the eve of the owning spouse's institutionalization." The court, however, rejects Mrs. Keip's request that she be awarded \$20,000 in damages to compensate for her losses due to the "unnecessary forced purchase of an irrevocable annuity."

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