DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration
Region IX

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AUG 3 1 2001

Nancy Angres, Administrator
Nevada State Welfare Division
2527 North Carson Street
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Post-it® Fax Note 7671	Date	# of pages ▶ 4
To Dan Hart	From Laurie Buck	
Co./Dept.	Co.	
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Dear Ms. Angres:

The Health Care Financing Administration was recently renamed to the Centers for Medicare and Medicaid Services (CMS). This is in response to two letters, dated December 12, 2000, and February 16, 2001, from Laurie Buck on behalf of your Attorney General, which challenged CMS's position regarding Nevada's new annuity policy. The State's policy treats payments from an annuity that exceed the maximum spousal impoverishment income allowance as a transfer of assets for less than fair market value. We had previously informally advised the State that in placing such a limit on the amount of income an annuity can generate for a community spouse, the State is effectively imposing a penalty on a transfer to a third party (in this case, the annuity) for the benefit of the spouse, which is in violation of section 1917(c)(2)(B) of the Social Security Act (the Act). We have reviewed the arguments contained in your Attorney General's two letters and have concluded that Nevada has not raised any arguments that would cause us to alter our previous opinion on this matter. Following are specific comments addressing the relevant points raised by Nevada.

Summary of Nevada's Position

Nevada argues that the spousal transfer exemption provisions contained in sections 1917(c)(2)(B)(i) and (ii) are inconsistent both with the provisions contained in section 1924(f), and with Congress' intent in passing the Medicare Catastrophic Coverage Act (MCCA). Thus, Nevada claims, subsection 1917(c)'s spousal transfer exemption provisions are superceded under section 1924(a), and States may accordingly impose a transfer penalty pursuant to section 1924(f)(1) for transfers resulting in annuity payments that exceed the community spouse resource allowance (CSRA).

CMS Response

We disagree. We believe section 1924(f)(1) does not conflict with section 1917(c) precisely because there is no penalty for transfers between spouses under subsection 1917(c)(2)(B). As such, section 1924(f)(1) merely provides an institutionalized spouse with permission to do what he or she can already do without any consequences. Although this has led us to conclude that the reference to section 1917(c)(1) in section 1924(f)(1) is superfluous, we do not agree that this reading makes subsection 1924(f) entirely meaningless, as Nevada asserts in disagreeing with our interpretation.

Nevada relies heavily on a state court opinion, McNamara v. Ohio Department of Human Services, 2000 Ohio App. LEXIS 3477, in support of its opposition to our interpretation. The McNamara court believed that giving effect to the spousal transfer exemption provisions contained in sections 1917(c)(2)(B)(i) and (ii) would nullify section 1924(f) in its entirety. We believe this view to be incorrect, in part because other provisions within section 1924(f) have continuing effect without regard to the reference to section 1917(c)(1) in section 1924(f)(1).

Section 1924(f) permits transfers of resources from the institutionalized spouse to the community spouse. These transfers would not be subject to a penalty under section 1917(c), since that section permits interspousal transfers of any amount. CMS's manual instructions concerning section 1924 give meaning to the provision by allowing an institutionalized spouse who became Medicaid eligible in the initial determination after institutionalization to remain eligible even though his or her resources exceed the resource standard, if those excess resources are within the community spouse resource allowance.

During the first determination of eligibility of an institutionalized individual with a community spouse, both spouses' resources are pooled. The couple's combined resources are considered in this initial eligibility determination and the State deducts the community spouse resource allowance from the pooled resources to determine the initial resource eligibility of the institutionalized spouse. These rules appear in section 1924(c)(2)(A). Upon redetermination of eligibility, the State cannot pool the couple's resources; any resources held in the name of the institutionalized spouse will be counted in determining his or her eligibility (see section 1924(c)(4)).

To give content to the provisions of section 1924(f), CMS interprets the provision as protecting the institutionalized spouse's eligibility to the extent that he or she has resources above the resource standard, but within the community spouse resource allowance, until the next regularly scheduled redetermination of eligibility. This protection enables the institutionalized spouse to transfer resources, or obtain a court order to facilitate such a transfer, or increase the community spouse resource allowance, without facing an immediate redetermination of eligibility. Otherwise, should the institutionalized spouse have resources above the community spouse resource allowance which would make him or her ineligible, the State could redetermine his or her eligibility immediately without having to wait until the next regularly scheduled redetermination. This is the position that section 3262.4 of the State Medicaid Manual attempts to articulate.

Thus, the definition of the community spouse resource allowance (CSRA) contained in section 1924(f)(2)(A) has meaning and performs a function even if, as Nevada suggests, section 1924(f)(1) is treated as a nullity. Treating section 1924(f)(1)'s ambiguous reference to section 1917(c)(1) as a nullity would have no impact on the operation of section 1924(f)(2), notwithstanding the McNamara court's over-broad conclusion to the contrary. Therefore, we believe that the McNamara court's analysis and conclusion are erroneous and that the spousal transfer exemption provisions contained in sections 1917(c)(2)(B)(i) and (ii) must continue to be given full effect.

We also note that there is no express penalty provision in section 1924(f), and by implying one under that section, as Nevada's interpretation does, Nevada's policy conflicts with section

1917(c)(4), which states, "a State may not provide for any period of ineligibility for an individual due to the transfer of resources for less than fair market value except in accordance with this subsection (i.e., section 1917)." (Emphasis supplied). Nevada points out that the express limitation contained in section 1917(c)(4) was enacted concurrent with subsection 1924. As such, we believe that it is doubtful Congress implicitly intended to supercede section 1917(c)(4)'s specific language by simultaneously enacting the general language contained in section 1924(a)(1). We think it more likely that Congress would have expressly listed in section 1924(a)(1) those provisions of subsection 1917 that it believed were inconsistent with (and superceded by) subsection 1924 (as it did, for example, for sections 1902(a)(17) and 1902(f), if those provisions were in fact inconsistent. Because Congress did not do so, Nevada may not craft a policy that implies a transfer penalty under section 1924(f)(1) in the form of an ineligibility period without effectively treating section 1917(c)(4) as a nullity.

Moreover, we note that neither Nevada, nor any of the legal authorities it cites, has considered section 1917(c)(4) in their respective analyses of how subsections 1917 and 1924 interact in light of the general superceding language contained in section 1924(a)(1). As discussed above, the McNamara court's primary, if not sole, legal basis for its conclusion that sections 1917(c)(2)(B)(i) and (ii) are superceded by section 1924(a)(1) is the court's concern that to hold otherwise would render section 1924(f) a nullity. However, the McNamara court's conclusion would have the effect of implicitly rendering section 1917(c)(4) null and void without even discussing this section in its analysis, let alone offering a sound legal basis for a conclusion that would negate the clear intent Congress expressed in section 1917(c)(4). Thus, we do not agree that Congress intended to supercede either sections 1917(c)(2)(B)(i) and (ii), or section 1917(c)(4), and Nevada has not offered any binding or convincing legal authority that would cause us to believe otherwise.

We must also disagree with Nevada's assertion that section 1917(c)'s transfer penalty provision may be effectively grafted onto section 1924(f)(1), because we believe that section 1917(c) and section 1924(f)(1) plainly apply to different situations. Section 1917(c) generally operates as a limitation on coverage for certain enumerated services. Under this provision, a State looks at any disposal of assets for less than market value that took place during the 36 months prior to the application for medical assistance under the State plan. The focus of the State's effort is to determine the applicant's initial eligibility to have payment made for the enumerated services. Section 1924(f)(1), by contrast, contemplates a transfer of resources to the community spouse after the date of the initial determination of eligibility. The permissive transfer under section 1924(f)(1) therefore does not retroactively affect the initial eligibility determination of the institutionalized spouse, but instead applies to the post-eligibility distribution of resources. Moreover, the focus of section 1924(f)(1) is on maintenance of the community spouse after the institutionalized spouse's eligibility has been established, and not on re-visiting the initial eligibility determination. Nevada's policy of applying section 1917(c)'s transfer penalty provision is therefore based on an erroneous belief that section 1924(f)(1) and section 1917(c) apply to the same situation. Again, this is not to say that section 1917(c) and section 1924(f)(1) are inconsistent; rather, the two provisions simply address two different situations.

As explained above, Nevada's policy regarding its treatment of annuities is in violation of section 1917(c)(2)(B) of the Act. Accordingly, we request that the State modify its annuity policy to comport with CMS's policy regarding this matter. Please advise us, within 30 days, of the actions Nevada plans to take to address this issue. If you have any questions, please contact Lee Netzer of my staff, who may be reached at (415) 744-3595.

Sincerely,

for Linda Minamoto
Associate Regional Administrator
Division of Medicaid

cc: Frankie Sue Del Papa, Nevada Attorney General (via facsimile: (775) 684-1145)
Charles Duarte, Administrator, Division of Health Care Financing and Policy
Lynette Grundy, Chief, Eligibility and Payments Branch, Nevada State Welfare Division
Jeanette Hills, Deputy Administrator, Nevada State Welfare Division