

The Out-of-State Former Home: Federal Law Requires That Intent to Return in the Indefinite Future *Not*, by Itself, Preclude a Finding of Residence in the New State

By Ron M. Landsman

States that follow a fairly precise application of the SSI rule respecting treatment of former homes may seem to put some long term care residents in a Catch-22 quandary. The former home in another state can be excluded as an available resource, but only so long as the individual intends to return to the home (42 C.F.R. § 435.405(i)(4)). But that very intent may appear to exclude what appears to be required for the resident in the new state to get Medicaid benefits there -- presence in the new state combined with an intent to remain permanently or for an indefinite period of time. To put it more practically, 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.

To be sure, there was always an explanation why the two are easily reconciled -- residence in the new state only requires intent to remain for an "indefinite period of time," whereas the home exclusion (not domicile in the other state) should rest only on an intent to return "sometime in the future."

Nonetheless, that was the policy in Maryland for many years. It was particularly pernicious in Maryland since it is in a three-state area with many nursing home admissions for elderly individuals who until then had lived in the District of Columbia, or parents who moved to be near children who had come to the area many years earlier for professional reasons.

Maryland reversed its policy in 1995 in response to correspondence reviewing the administrative history of Federal policy respecting establishing residence. The Elderlaw Report ran a short item on the new policy, but otherwise the change went unheralded. In working on a complicated plan involving a clients move to one of three states, it turned out that South Carolina continues to follow this out-moded policy. Since Federal law appears to prohibit such a policy, the original letter that persuaded Maryland to back off -- without confessing error -- might be of use to others. It follows in its entirety.

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 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 principals. In the present cases, as well, narrow and precise Federal law directs Maryland not to deny residence status to individuals like 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 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,¹ 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 of time.

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

1

See, e.g., House Report No. 99-727 (July 31, 1986), to accompany H.R. 5300, pp. 108-109, 1986

U.S. Code Cong. & Adm. News p. 3698.

prohibition in § 1396a(b)(2) cannot be avoided by putting the prohibited requirement in as instruction to caseworkers in the Manual without specification in the State Plan.

But long before the statutory provision was added, since October 15, 1979,² HCFA has directed the States to treat as a resident every institutionalized individual over age 21, subject to exceptions not applicable here.³ 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" ⁴ 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."⁵ The phrase "intention to remain permanently or for an indefinite period" was consistent with longstanding case law respecting residence,⁶ indeed including Maryland common law on domicile.

Maryland's prohibition against finding residence for individuals like Mr. N----- and Mrs. Reid plainly runs afoul of HCFA's state purpose, as well as the specific proscriptions. If New Jersey had regulations like 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

2 See 44 Fed. Reg. 41434, 41438 (July 17, 1979), adding the predecessor provision, 42 C.F.R. § 435.403(g)(4).

3 E.g., individuals who lost capacity before age 21, 42 C.F.R. § 435.403(i)(2), and those receiving certain benefits or placed by a State agency, 42 C.F.R. § 435.403(e)-(g).

4 The exception elided -- where another State makes the placement -- does not apply here.

5 44 Fed. Reg. 41434 (July 17, 1979).

6 43 Fed. Reg. 35077.

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 of 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 here for an indefinite period of time 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.**
j:\...elderlaw\articles\outofst.at