

BRAUNSTEIN AND TODISCO, P.C.

ATTORNEYS AT LAW

ONE ELIOT PLACE

FAIRFIELD, CONNECTICUT 06824-5154

SAMUEL L. BRAUNSTEIN*
E-mail sam@btlawfirm.com

AMY E. TODISCO
E-mail amy@btlawfirm.com

*ALSO ADMITTED IN TEXAS

(203) 254-1118

FACSIMILE (203) 254-2453

www.btlawfirm.com

March 15, 2011.

To: Senator Anthony J. Musto, Representative Peter A. Tercyak and Honorable Members
of the Human Services Committee

From: Amy E. Todisco, Esq.

RE: GOVERNOR'S BILL #1013

- I. Section 42-- Proposed Repeal of P.A. 10-73, An Act Concerning Medicaid Long-Term Care Coverage for Married Couples**
- II. Section 40, paragraph (d)-- Prohibition of Reduction in Transfer of Assets Penalty Upon Partial Return of Gifted Funds**

I am an elder law attorney in Fairfield, Connecticut, and I am the immediate Past President of the Connecticut Chapter of the National Academy of Elder Law Attorneys, Inc. ("CT NAELA"). CT NAELA was the proponent of P.A. 10-73, and I am here today to testify in opposition to the proposed repeal of this legislation in Section 42 of the Governor's proposed budget, and also in opposition to Section 40, paragraph (d), a proposed prohibition of a reduction in transfer of assets penalty upon partial return of gifted funds.

I. Section 42-- Proposed Repeal of P.A. 10-73, An Act Concerning Medicaid Long-Term Care Coverage for Married Couples

Section (1) of Public Act 10-73 allows the Community Spouse to keep the home residence, a car and **all** of the couple's non-exempt assets up to \$109,560.00 in 2011, and the institutionalized spouse is immediately eligible for Medicaid. If the couple has non-exempt assets in excess of \$109,560.00, those assets in excess of \$109,560.00 will have to be spent-down in order for the institutionalized spouse to be eligible for Medicaid. Under prior law, if a couple's assets on the date one spouse becomes institutionalized are \$50,000.00, the well spouse could only keep 50% of that amount, or \$25,000.00 because \$25,000.00 was less than \$109,560.00. The remaining \$25,000.00 was deemed by the State to belong to the ill spouse and had to be spent down before the ill spouse was

Senator Anthony J. Musto
Representative Peter A. Tercyak
Honorable Members of the Human Services Committee
March 15, 2011.
Page 2

eligible for Medicaid. However, it is critical to understand that the spend-down of the \$25,000.00 was accomplished by the Community Spouse paying the nursing home; rather, the Community Spouse would purchase prepaid funeral contracts, make home repairs, and purchase such other personal property for the sake of spending the money. The spend-down of such small amounts was almost never made by paying the nursing home; the State started to pay for the ill spouse as soon as the Community Spouse had spent down the \$25,000.00. Under the old law, this left the Community Spouse only \$25,000.00 in assets and most often a small social security amount with which to maintain and repair the home, pay real estate taxes and assessments and try to survive in the community. Under P.A. 10-73, the Community Spouse is entitled to keep all of the \$50,000.00 in this example, and the ill spouse is immediately eligible for Medicaid without any part of the couple's assets being spent-down.

The Department of Social Services has once again alleged that under P.A. 10-73, the cost to the State is between \$30-60 million. These are the same numbers D.S.S. alleged would be the cost to the State last year when it opposed passage of P.A. 10-73. I was in the meeting that was convened by then Human Services Co-Chair, Senator Paul Doyle and Senator Leonard Fasano with liaison representatives from D.S.S. At that meeting, we were all handed a memo from D.S.S. alleging the costs of \$30-60 million to the State if the legislation were to pass. D.S.S. was asked by Senators Doyle and Fasano to substantiate and document their data, and to set forth the basis for the alleged costs to the State of between \$30-60 million. D.S.S. was given the opportunity to produce this data by the following day. D.S.S. did not produce any documentation because such did not exist. Then Acting Commissioner Starkowski withdrew D.S.S.' objections to the legislation and the bill passed the Senate and went on to become P.A. 10-73. The alleged cost to the State that D.S.S. had presented as actual were mere conjecture; it is very interesting that those very same numbers now appear in the Governor's Bill #1013 at Section 42. When Governor Rell directed all departments and agencies to reduce their expenses by 10-15% which would be reflected in the proposed budget to the Office of Policy and Management ("OPM"), D.S.S. submitted its annual budget options to OPM, one of which stated as follows: "rescind use of maximum Community Spouse Protected Amount and revert to prior treatment of spousal assets." Governor Malloy adopted D.S.S.'s option in his Proposed Budget Bill #1013 on the basis that the cost savings to the State of \$30-60 million were actual and real.

P.A. 10-73 does not cost the State money, but actually saves the State of Connecticut money. Under the old law, there were circumstances under which a Community Spouse could be allowed to keep more than the amount determined under the State's old 50%

Senator Anthony J. Musto
Representative Peter A. Tercyak
Honorable Members of the Human Services Committee
March 15, 2011.
Page 3

formula. However, in order to keep more than the permitted amount, a Community Spouse had to request an administrative Fair Hearing and demonstrate why he/she was entitled to receive the additional assets. A Fair Hearing is expensive to the State because it requires the intake eligibility worker to prepare the file for the hearing which detracts from his/her other cases. The Fair Hearing officer then expends considerable time in preparing for the hearing, conducting the hearing and issuing a written decision, all at significant cost to the State. This expense is eliminated by stream-lining the process and allowing the Community Spouse to keep the maximum amount of assets permitted under federal law under P.A. 10-73 without ever having to go to a Fair Hearing. According to the Legislature's Office of Fiscal Analysis, P.A. 10-73 had no fiscal impact on the state's budget. In fact, the Legislature reviewed both the OFA report as well as information provided by the Department of Social Services and concluded that the impact would be of cost savings due to the savings on fair hearing cases.

Additionally, P.A. 10-73 does not accelerate eligibility for Medicaid/Title 19. P.A. 10-73 is budget neutral to the State of Connecticut because under the old law, the State would have to start paying for the ill spouse as soon as the spend-down was complete; the spend-down was almost never made to the nursing home so the State would begin to pay for the ill spouse at the same time it starts to pay under P.A. 10-73.

To repeal P.A. 10-73 is counterintuitive when Governor Malloy's other budget proposals seek to transition individuals currently in nursing homes out into the community. The repeal of P.A. 10-73 will have the exact opposite result: it will accelerate eligibility for Medicaid/Title 19 for the Community Spouse because if assets have to be spent down, the State will have to pay for other entitlements for the Community Spouse to remain in the community.

II. Section 40, paragraph (d)-- Prohibition of Reduction in Transfer of Assets Penalty Upon Partial Return of Gifted Funds

Section 40 of the Governor's proposed budget seeks to prohibit a reduction in a transfer of asset penalty when a gifted asset is partially returned to the donor. Under Medicaid law, if an individual makes a gift of an asset to another, and then applies for Medicaid, unless the gift is exempt, in most cases the individual who made the gift will not be eligible for Medicaid for a period of time for having made that gift. The result of ineligibility for Medicaid is that the nursing home or home care provider is not compensated for the services provided to the individual.

Senator Anthony J. Musto
Representative Peter A. Tercyak
Honorable Members of the Human Services Committee
March 15, 2011.
Page 4

In order to shorten the length of the period of ineligibility when a transfer of an asset has been made, Medicaid law allows for what is known as the "partial return" rule. That rule provides that if the person who received the gift returns partially returns it to the transferor (the individual applying for Medicaid), the original period of ineligibility resulting from the gift is reduced. The Governor's proposed budget bill at Section 40 seeks to repeal the "partial return" rule and impose a "full return" rule. Under the "full return" rule, in order for a period of ineligibility for Medicaid to be reduced, the **entire** amount of the gift would have to be returned, otherwise no reduction in a period of eligibility would be given. In addition to this proposed rule being in violation of Federal law, the proposed "full return" rule makes no sense. Why would anyone voluntarily partially return a gift if it will not reduce the penalty period for the transferor? The proposed "full return" rule makes no sense because it would not give any recipient of a gift the incentive to return it. Further, the repeal of the "partial return" rule and adoption of a "full return" rule would result in providers not being compensated for their services.

In addition, when the Department of Social Services filed its proposed regulations implementing the Deficit Reduction Act of 2005 with the Legislature's Regulations Review Committee in March 2009, the regulations also contained a concept that if a gift was returned, it would be deemed to have been available to the individual from the date of the original gift to the date of its return. The proposed regulations, and this concept, were rejected by the Regulations Review Committee as being in violation of federal Medicaid law. The Department of Social Services then wrote to the Centers for Medicare and Medicaid ("CMS"), seeking confirmation that its treatment of a returned asset as having been available to the individual from the date it was gifted was required by federal law. Twice, CMS advised D.S.S. that its interpretation of federal law was wrong. Section 40 of the Governor's proposed budget Bill #1013 seeks to include the very concept that CMS has previously advised D.S.S. is in violation of federal law.

The repeal of P.A. 10-73 and the elimination of the partial return rule for transfers of assets constitute bad policy and will hurt the most vulnerable population, our Connecticut seniors. I strongly encourage you to reject the repeal of P.A. 10-73 at Section 42 of Bill #1013, and to reject the elimination of the partial return rule for transfers at Section 40 of Bill #1013.

Sincerely,
Braunstein and Todisco, P.C.


Amy E. Todisco