MEDICAID TREATMENT OF INDIVIDUAL RETIREMENT ACCOUNTS

by

FRANCES M. PANTALEO, ESQ.

Bleakley Platt & Schmidt LLP
White Plains

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This outline will discuss the Medicaid treatment of work related plans which provide income for retirement. These include Individual Retirement Accounts (IRAs), 401(k)s, 403(b)s, Keough accounts (for self employed individuals), pension plans, and Roth IRAs. Depending on the requirements established by the employer, some profit sharing plans are also considered retirement funds. For purposes of simplicity, all such accounts will be referred to as "retirement accounts" unless the outline specifically discusses a particular type of account.

I. Treatment for Applicant/Recipient

(A) New York State's Medicaid regulations at 18 N.Y.C.R.R Section 360-4.6 (b)(2)(iii) provide that "pension funds belonging to an ineligible or nonapplying legally responsible relative which are held in individual retirement accounts or in work-related pension plans, including plans for self-employed individuals such as Keogh plans" shall be disregarded as resources. "However, amounts disbursed from a pension fund to a pensioner are income …which will be considered in the deeming process" Although a strict reading of this regulation would appear to require that retirement accounts be treated in all instances as exempt resources, the interpretation of the regulation by the Medicaid program is quite complex.

(B) **Countable Resource** – If an elderly or disabled Medicaid applicant owns a retirement account, and is able to make withdrawals from the account, the account will be considered an available resource to the Medicaid applicant. The fund's value is the amount available to the individual after any penalty for early withdrawal. Any taxes due upon the distribution of the withdrawn funds are not deductible in determining the fund's value. If the individual is eligible for periodic retirement benefits, he or she must apply for those benefits or the Medicaid application will be denied. If the individual is not entitled to periodic payments but is allowed to withdraw any of the funds, the fund is an available resource to the extent of the funds available for withdrawal. See, NYS Department of Health Medicaid Reference Guide ("MRG") at 316; SSA POMS Section SI 01 120.210.

(C) **Exempt Resource-** If the Medicaid applicant owns a retirement account but is in receipt of, or has elected to receive, "periodic payments" from the account, the retirement account is not a countable resource. See Department of Health Medicaid Reference Guide ("MRG") at 316 and General Information System Message ("GIS") 98 MA/024 (issued to clarify the statewide policy and treatment of retirement funds).

The applicant, if eligible, must apply for "periodic payments" from the retirement account in order to be eligible for Medicaid. The MRG at p.317 states that, the applicant must apply for "maximized" benefits as a condition of eligibility. GIS 98 MA/024 states that the Medicaid applicant "must choose the maximum income payment that could be made available over the individual's lifetime". The placing of the retirement account into "periodic payment" status will result in the principal of the retirement account no longer being treated as an "available resource" although the stream of payments will be treated as "income" in the Medicaid eligibility process.

(D) **Exceptions:**

(a) Effective October 1, 2011, retirement funds of an individual who participates in the Medicaid Buy-In Program for Working People with Disabilities, or his or her spouse, are disregarded regardless of whether these funds are in "periodic payment" status. See Chapter 59 of the Laws of 2011, 11 OHIP/ADM-07 and MRG p. 391. In addition, since 2010, pregnant women and children who apply for Medicaid are no longer required to document their resources.

(b) GIS 98 MA/024 states that a retirement account is not a countable resource if the individual has elected to receive periodic payments which are less than the maximum periodic payment which is available **and** the election is irrevocable.

(c) An applicant who has met the minimum benefit duration requirement of a New York State Partnership for Long Term Care policy is not required to maximize income from a retirement account.

(E) **What constitutes Periodic Payments**? Many county Departments of Social Services require that the Medicaid applicant take distributions from retirement accounts in accordance with life expectancy tables utilized by the Social Security Administration. However, other counties treat retirement accounts as exempt resources if an applicant is over the age of 70 ½ and is taking only the minimum required distribution ("RMD") required by the IRS Tables. Many permit the use of the IRS RMD tables for married applicants, but require the use of the Social Security tables for single individuals. See, annexed Memorandum dated July 15, 2014 from the Oneida County Department of Social Services Legal Division which indicates that the SSA tables shall be used for single individuals but that the IRS RMD may be used for married individuals who are subject to spousal budgeting. The memo indicates that this interpretation was the result of a conversation between the writer and Eileen Brennan of the NYS Office of Medicaid Management.

(F) **Social Security Life Expectancy Tables**. Prior to the adoption of the Deficit Reduction Act, local Departments of Social Services generally used a life expectancy table which was annexed as Attachment IV to 96 ADM-8. In 2006, an updated life expectancy table based upon values established by the Social Security

Administration was annexed as Attachment VIII to O6 OMM-05. The Department of Health has issued periodic updates to the life expectancy table as the Social Security Administration issues new tables. The latest table was annexed as an exhibit to GIS 12 MA/012 which was issued by the Department of Health in July 2012 and is annexed to these materials. This table will be subsequently referenced as the "Social Services" life expectancy table.

(G) **Fair Hearing Decisions**: Several Fair Hearing decisions have concluded that retirement accounts were not countable resources even though the Medicaid applicant/recipient was taking a periodic payment which was less than the distribution which would be required under the Social Services life expectancy table:

> In Matter of Arnold S. FH # 3701203H (Monroe County, May 28, 2002) the Commissioner's Designee concluded that once the applicant has applied for or received periodic payments, the retirement account is no longer considered an available resource even though the local Social Service department argued that the applicant's election was not irrevocable and the applicant had the ability to receive the entire amount from the retirement account. Both the applicant and applicant's wife had retirement accounts and had elected monthly payments in excess of the required minimum distribution amount, but less than the amount required by the SSA table. Since the applicant and his wife were both receiving periodic payments, the retirement accounts were determined not to be countable resources. The decision does not address the issue of whether a retirement account would be exempt if the account owner was only taking the required minimum distribution. The decision also does not reach the issue of what distribution is required for an individual who is under the age of 70 ½ and not subject to the requirement to take a required minimum distribution under the IRS Tables.
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> In Matter of Kern, FH #3873663J, (Monroe County, July 8, 2003) the 78 year old Medicaid applicant had elected to receive regular monthly payment of the required minimum distribution amount from his retirement account. The payout under the RMD would take place over a life expectancy of 19.2 years. The applicant had a 73 year old wife in the community. The local agency requested that the applicant increase the monthly payments to an amount which would payout over 7.83 years, as required by the Social Services life expectancy table. The agency's request would have increased the monthly payments from $915 to $2,150.67 per month! The applicant did not comply with the request and the agency denied the Medicaid application. The Commissioner's designee determined that "there is simply no current legal authority supporting the policy objective of requiring a "maximum income payment option" in cases involving a community spouse. While there is legal authority for an individual seeking Medicaid to generally be so required, there exists no legally-sanctioned longevity table for use in any case involving a couple."

In Matter of Appeal of _____, FH # 5337190Z (Suffolk Co. August 3, 2009) a married 76 year old Medicaid applicant had a 68 year old spouse living in the community. The applicant had elected to take periodic distributions from his retirement account based upon the life expectancy table applicable to his wife. The County took the position that the Medicaid applicant and his wife were both required to maximize the distributions from the retirement accounts using the life expectancy table annexed to 06 OMM/ADM 5. The decision concludes "the Agency's reliance on (these life expectancy tables) is an error of law…Under the IRS code, the RMD of IRAs should be based on the IRS tables." The decision notes that the applicant was taking his periodic distribution based upon the life expectancy of his wife and that this distribution was greater than the RMD.

(H) **Distributions Prior to age 70 1/2**: If the applicant is under the age of 70½, all counties require the use of the Social Services life expectancy table to determine the required pay-out to the applicant. If the applicant is over 59½ or is disabled, the applicant can take payments from the account without imposition of the 10% early withdrawal penalty tax. See, IRC §72(t)(2)(A)(iii). Disability is defined at IRC §72(M) as inability "to engage in ***any*** substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration. An individual shall not be considered to be disabled unless he furnishes proof of the existence thereof in such form and manner as the Secretary may require." (Emphasis supplied.)

(I) **Practice Tip:** Due to recent changes in OMRDD and OMH policies, disabled individuals who live in congregate housing will now be billed at increased rates for their residential services, unless they are on Medicaid. Many of these disabled individuals work on a part time or full time basis but would find their income substantially diminished if they were forced to pay the full freight for congregate housing. If these individuals apply for Medicaid under the Medicaid Buy-In Program for Working People with Disabilities, their eligibility will be determined without regard to the assets they hold in retirement accounts and they will not be required to take any current distributions from the accounts. See, Chapter 59 of the Laws of 2011, 11 OHIP/ADM-07 and MRG p. 391.

(J) **Advocacy Tip:** Individuals who are younger than 59 ½ or are still working may not be eligible to receive payments from their retirement account. If the Medicaid applicant is not eligible to receive distributions from the retirement account, the account is not an available resource and is exempt. Submit a letter from the plan administrator to verify the inability to withdraw funds from the account. See, MRG at p.316: "A retirement fund is not a countable resource if an individual must terminate employment in order to obtain any payment"

(K) **Income** – The amount of income received from a retirement account is treated as unearned income of the Medicaid applicant. 98 MA/024 states at p. 2:

"Once an individual is receiving periodic payments, the payments are counted as unearned income on a monthly basis, regardless of the actual frequency of the payment. For example, if the periodic benefit is received once a year, the amount is to be divided by twelve to arrive at a monthly income amount."

(L) **Lump Sum or Non-Regularly Recurring Distributions**: The MRG at p. 316 provides the following: "**NOTE**: That the SSI-related individual may choose to take money out of a retirement account on a non uniform and/or inconsistent basis. An example would be an individual electing to withdraw $350 from a retirement fund in February and $600 in October. These irregular withdrawals are not treated as periodic payments. The non-periodic distributions are considered a conversion of a resource and not countable income. In this instance, the retirement fund is treated as an available, countable resource."

(M) **Practice Tip:** Individuals who apply for Medicaid may have recently taken distributions from their retirement accounts which are greater than the distribution required by the RMD or the Social Services table. Similarly, applicants may have taken irregular and inconsistent distributions from their retirement accounts. In these instances, the applicant should be advised to send a letter of instruction to the account administrator to reduce the prospective payments and/or establish a prospective monthly distribution of an amount which will satisfy the local Department of Social Services. Some counties will accept such a letter of instruction as sufficient proof of the prospective periodic payment. However, others may take the position that the full amount of the distribution taken in the year prior to the Medicaid application must be used in calculating the income attributed to the retirement account. Although the IRS permits a taxpayer to calculate the total RMD required from all retirement accounts and then permits the taxpayer to take the total RMD from any one, or several of the accounts, this rule does not apply to the Medicaid program. The Medicaid applicant should be advised to place each retirement account into periodic (i.e. monthly) payment status.

(N) **Practice Tip**: For community Medicaid applicants, surplus income, including distributions from retirement accounts, may be placed into a self-settled or pooled income supplemental needs trusts. Consider whether it may be advisable to take a larger distribution from the retirement account than the Social Services table requires so that the trust will have sufficient funds to pay the income taxes which will be generated by the distributions from the retirement account and the Medicaid recipient will have sufficient income to pay all anticipated household expenses.

(O) **Roth IRAs**. There is no specific discussion of Roth IRAs in the SSI POMS, the regulations, the administrative directives or the MRG. There is no IRS requirement for the Roth owner to take required minimum distributions after age 70 ½. However, since a Roth IRA can be placed into a period payment status, it should be subject to the rules that apply to any other retirement accounts. Note that the Deficit Reduction Act treats Roth IRA's the same as any other qualified plans or retirement accounts, thereby lending support to the argument that Roth IRAs should be treated the

same as any other retirement account and therefore be exempt if placed into "periodic payment" status. Anecdotal evidence provided to the author indicates that most county social services departments treat Roth IRA's the same as all other retirement accounts.

(P) **How to Calculate the Required Minimum Distribution:** Most Social Services offices will request written documentation from the account administrator of the required minimum distribution amount ("RMD".) However, if the Medicaid applicant is unable to obtain the RMD from account administrator, the amount can be easily calculated by following the directions set forth in IRS Publication 590. The RMD is calculated by dividing the account balance as of the close of business on December 31st of the preceding year by the applicable distribution period or life expectancy. The distribution period is listed in Table III, the Uniform Lifetime Table, which is annexed as Exhibit C to IRS Publication 590.

II. Treatment of Retirement Assets Held by the Community Spouse

(A) **Exempt Resource** – 18 N.Y.C.R.R. §360-4.6 (b)(2)(iii) states that retirement accounts of a nonapplying legally responsible relative are a disregarded resource of the Medicaid applicant. However, any amount disbursed to the spouse will be considered as income considered in the deeming process. In contrast, and perhaps contradiction to this provision, a December 21, 2005 amendment to 18 N.Y.C.R.R. §360-4.10(a)(9) states that "Resources do not include those disregarded or exempt under sections 360-4.4(d), 360-4.6(b) and 360-4.7(a)… except that pension funds belonging to a community spouse which are held in (retirement accounts) are countable resources of the community spouse for purposes of determining the institutionalized spouse's eligibility and calculating the amount of any community spouse resource allowance."

(1) Prior to the recent amendment to the regulations at 460-4.10 (a)(9), New York's policy provided that the principal balance of the community spouse's retirement accounts would first be counted toward the community spouse's resource allowance ("CSRA") and that any excess in the retirement accounts would be considered exempt and not available to the institutionalized spouse. See 90 ADM-36 and GIS 98 MA/024. Although the excess resources were exempt, the inclusion of the retirement accounts towards the calculation of the CSRA could cause non-retirement funds to exceed the CSRA. The notice published in the New York State Register on January 19, 2005 in support of the regulatory amendment indicates that "The purpose of the proposed regulatory amendment is ….to clarify that in determining Medicaid eligibility for an institutionalized spouse, a community spouse's pension fund or IRA is a countable resource."

(2) The Office of Medicaid Management issued GIS 06 MA/004 on January 12, 2006 to inform local social services districts of the amendment to the regulations at §460-4.10(a)(9). The memorandum states that if the community spouse is **NOT** receiving periodic payments from his/her available retirement fund, the fund is considered a countable resource for purposes of determining the CSRA and the institutionalized spouse's Medicaid eligibility. See also, MRG at 316-317. Thus, the

GIS implies that if the community spouse ***is*** receiving periodic payments from his or her retirement accounts, the accounts should not be counted towards the CSRA or in determining eligibility of the institutionalized spouse.

(3) Some commentators believe that the community spouse's IRA should be totally exempt and should not be applied to the CSRA based upon the argument that the methodology used in determining Medicaid eligibility cannot be any more restrictive than the methodology used under the federal Supplemental Security Income ("SSI") program. The GIS Memorandum and revised regulations appear to violate the specific provisions of the POMS at 01.120.210 that the retirement funds of a non-applying spouse or parent are to be excluded from the deeming process. Compare Keip v. Wisconsin Dept. of Health & Family Services, 232 Wis.2d 380 (Ct. of App. Wisconsin 1998) with Mistrick v. Division of Med. Assistance & Health Services, 154 N.J. 158 (Sup. Ct. NJ 1998).

(4) **Practice Tip**: If the CS will find it difficult to meet anticipated expenses from his/her assets and income, he or she should consider whether it is advisable to liquidate the otherwise exempt retirement assets of the institutionalized spouse/Medicaid applicant prior to submitting the Medicaid application (taking into account the income tax consequences of such distribution) and to transfer the funds to the community spouse.

(B) **Income** – Any amounts paid to the community spouse are considered income to the spouse and countable in determining whether the community spouse has income in excess of the Minimum Monthly Maintenance Needs Allowance. 18 N.Y.C.R.R. §360-4.6(b)(2)(iii).

(1) In Matter of Elizabeth , FH # 4008047R (Onondaga County February 26, 2004) the spouse of the Medicaid applicant requested a hearing to request an enhanced CSRA. The spouse was taking required minimum distributions from his retirement account and the county argued that he should be required to take additional distributions sufficient to bring his income up to the MMMNA. The Commissioner's designee rejected the county's argument finding: "There is no provision in the regulations which would enable the Agency to require the Appellant's husband, as a non-applying spouse, to take additional income from his IRA. " The community spouse was granted an enhanced CSRA based upon the income generated by the RMD from his retirement accounts.

(C) **Practice Tip**: If the CS is under the age of 70 ½, he or she should be counseled to take periodic distributions from a retirement account if this will protect the account from being considered an available resource for purposes of calculating whether the spouse has assets in excess of the CSRA.

III. Treatment of Annuities held in Retirement Plans Under the Deficit Reduction Act of 2006

(A) The DRA imposed strict new rules on the purchase of annuities. 42 U.S.C. §1396p(c)(1)(G) states that the purchase of an annuity will be treated as a transfer of an asset which will result in the imposition of a period of Medicaid disqualification for long term care coverage unless the annuity is 1) irrevocable and non-assignable, 2) actuarially sound and 3) provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payments. However, the statute provides an exemption from these requirements if the annuity is a qualified retirement annuity described in subsection (b) or (q) of the Internal Revenue Code or is purchased with the proceeds from an account described in subsections (a) (c) or (p) of Section 408 of the IRC or a simplified employee pension as defined in Section 408(k) of the IRC or is a Roth IRA as described in Section 408A of the Code. These requirements are repeated in O6 OMM/ADM 5 and MRG at pp 452-454. See, Matter of _____, FH # 5337190Z (Suffolk Co. December 10, 2009)

(B) The DRA also modified 42 U.S.C. §1396p(c)(1)(F) to require that the purchase of an annuity be treated as a transfer for less than fair market value unless the state is named as the first remainder beneficiary of the annuity for at least the total amount of Medical Assistance paid on behalf of the institutionalized individual. Although the other DRA provisions do not apply to annuities contained within retirement accounts, most commentators agree that this provision does apply, if the retirement account was purchased after February 8, 2006, the effective date of the DRA. Moreover, the annuity provisions are binding upon any transaction regarding an annuity in which the individual changes the course of payment from the annuity or changes the treatment of the income or the principal of the annuity. These transactions include additions of principal, elective withdrawals, requests to change the distribution of the annuity, elections to annuitize the contract and similar actions. See, 06 OMM/ADM 5. p.6. Accordingly, if the Medicaid applicant or spouse has annuitized an annuity within an IRA or other retirement account, or made changes with the payout or beneficiary at any time after February 8, 2006, the Department of Social Services has the right to assert its right to be named as remainder beneficiary.

(C) In Matter of Entz v. Reed (Index # 2009-10454 Monroe Co. Sup. Ct. March 9, 2009) an 80 year old institutionalized Medicaid applicant had a single premium annuity within her IRA. The annuity had been purchased in 2005 when the applicant had inherited her deceased spouse's IRA. The distributions from the account satisfied the Social Security life expectancy tables. The annuity did not name the state as remainder beneficiary. The court concluded that the purchase of an annuity within a retirement account cannot be treated as a transfer of assets for less than fair market value provided that the required distributions are made. There is no further requirement that the IRA owned annuity must also name the State as beneficiary. Note that the applicant in this case purchased the annuity in 2005. It is unclear whether other courts would rule in such an absolute fashion that the Medicaid program may never require that the state be named as the remainder beneficiary of an annuity held within a retirement account.

IV. ESTATE RECOVERY

(A) The NY Medicaid program limits estate recovery to assets contained in the probate estate of the Medicaid recipient. Social Services Law §369. Thus, retirement accounts which have a named beneficiary will pass outside of probate and without any claim for recovery by the Department of Social Services.

(B) **Practice Tip**: Always advise the client to check the status of beneficiary designations. The nonapplying spouse should be counseled about whether to remove the Medicaid recipient spouse as designated beneficiary of retirement accounts. The Department of Social Services will generally require a Medicaid recipient to take the elective share of the estate of a deceased spouse. If a retirement account is distributed to the institutionalized spouse as part, or all of the elective share, and the Medicaid recipient spouse names beneficiaries the account, the remainder in the account at the death of the Medicaid recipient will be passed to the designated beneficiaries with no Medicaid estate claim. The Medicaid recipient will be required to take periodic distributions from the retirement account and these distributions will be treated as income of the Medicaid recipient.

V. NAMING A TRUST AS BENEFICIARY OF A RETIREMENT ACCOUNT

Retirement accounts have become a major source of inherited assets. Retirement accounts pose special challenges in the drafting of estate plans with trusts established for beneficiaries with disabilities, or who require lifetime management of their inheritance.

(A) **Drafting the Trust to qualify as a Designated Beneficiary**: Most individuals who desire to provide a legacy for an individual with special needs will want to leave the inheritance to a trust, rather than outright to the beneficiary, both to preserve much needed government benefits and to provide for appropriate management of the funds. This creates a problem when the inherited assets consist of retirement funds as the account owner will want to preserve the ability to have the retirement account paid out over the life expectancy of the beneficiary in order to reduce the income taxes which will be payable by the trust beneficiary upon each distribution from the account. In order to do this, the trust must qualify as a "designated beneficiary" under IRS regulations. If the trust does not qualify as a designated beneficiary, or if the account owner names his or her estate as the beneficiary of the retirement account, the account must generally be paid out over five years. Thus, the income taxation of the retirement account will be substantially accelerated unless the trust qualifies as a 'designated beneficiary."

Although the general rule is that a designated beneficiary must be an individual, the Treasury regulations at §1.401(a)(9)-4,A-5(b) permit a trust to qualify as a designated beneficiary if the Trust passes a five-pronged test:

1. The Trust must be valid under state law;

2. The Trust must be irrevocable or by its terms become irrevocable upon the death of the account owner;
3. The beneficiaries of the Trust must be identifiable from the Trust's terms;
4. Certain documentation must be provided to the Plan Administrator by October 31st of the year after the year of the participant's death, and
5. All Trust beneficiaries must be individuals.

A "conduit" trust requires that the trustee distribute the required minimum distribution of the retirement account to the beneficiary each year. The Trust beneficiary of a conduit trust will always qualify as the designated beneficiary. However, a conduit trust is rarely appropriate for a beneficiary with special needs as the required distributions from the trust must be distributed outright to the trust beneficiary and will disqualify the trust beneficiary from receipt of means-tested government benefits. Moreover, in most instances, the account participant will not want to the beneficiary to receive a mandatory distribution of cash from the retirement account. Instead, the trust should be drafted to permit the trustee to accumulate the required minimum distributions from the trust.

If an accumulation Trust satisfies all five prongs of the test, then the Trust beneficiaries will be deemed the designated beneficiaries of the Trust. The life expectancy of the OLDEST trust beneficiary will be used to determine the applicable length of the distribution period. Remainder and contingent remainder beneficiaries will all be reviewed in determining who is the oldest beneficiary of the trust.

Be Careful of Charitable Remaindermen: Individuals who have children with special needs often make provisions for charitable organizations that have provided services to the child to be remainder beneficiaries of the supplemental needs trust. However, naming a charitable remainder beneficiary of a retirement account which is distributed to a supplemental needs trust will cause the trust to fail the fifth prong of the designated beneficiary test, as a charitable organization is not an individual.

The following is sample language which can be added to a testamentary or intervivos trust to require the trustee of the supplemental needs trust to establish separate trusts for retirement benefits and to eliminate charitable organizations and individuals who are more than ten years older than the trust beneficiary from being remaindermen of these trusts. This language will assure that the trust qualifies as a designated beneficiary and that an appropriate distribution period will be used for distribution of the retirement account to the trust.

SAMPLE LANGUAGE REGARDING TRUST NAMED AS BENEFICIARY OF RETIREMENT ACCOUNT

(A) Notwithstanding any provision contained in this Trust agreement to the contrary, if at any time any portion of a trust or separate trust hereunder (the "original trust") is a beneficiary of, or consists of or receives payments from any "individual

retirement account", "qualified retirement plan" or similar tax-deferred retirement arrangement or annuity (hereinafter, "Retirement Plan"), then the trustees shall divide the trust into two separate trusts of equal or unequal value such that the assets of one trust will consist entirely of the non-Retirement Plan assets, and the second trust will consist solely and entirely of the Retirement Plan assets, and if there is more than one Retirement Plan, there shall be an additional separate trust created for each such Retirement Plan, and the trustees shall hold and administer the same in all respects as separate trust funds, upon the same terms and provisions as the original trust; provided, however, notwithstanding any provisions of the original trust, as of the date of Grantor's death, any person who would be a remainder or contingent beneficiary of such trust or portion and who would be counted as a beneficiary for purposes of Treasury Regulation Section 401(a)(9)-5, A-7, shall not be a contingent or remainder beneficiary of such trust or portion if his or her age is ten (10)[1] or more years older than the age of the individual who is the primary or income beneficiary of such trust or portion at the time of Grantor's death, and any such older contingent or remainder beneficiary shall be treated, solely for purposes of the separate trust or portion which is the beneficiary of a Retirement Plan, as if he or she predeceased Grantor. In addition, if a charitable organization which is a remainder or contingent beneficiary would be considered a beneficiary of such trust or portion for purposes of Treasury Regulation Section 401(a)(9)-5, A-7, then such charitable organization shall be treated, solely for purposes of the separate trust or portion which is the beneficiary of a Retirement Plan, as if such organization was not in existence at Grantor's death.

(B) The trustees must withdraw from such Retirement Plan, in each calendar year, and deposit into the Trust, the minimum distribution amount which is required to be withdrawn from such share under Section 401(a)(9) of the Internal Revenue Code, or other comparable Internal Revenue Code provisions or other applicable law. The trustees are authorized to elect the manner of payment from the Retirement Plan and to extend the pay-out period for as long as possible. However, this paragraph shall not be deemed to limit the absolute discretion of the trustees to withdraw from such Retirement Plan in any year more than the minimum distribution amount.

[1] Depending upon individual circumstances, the ten year age restriction may be changed at the discretion of the client or the drafting attorney.

Attachments to Materials:

1. **18 N.Y.C.R.R. §360-4.6**
2. **Excerpt from Medicaid Reference Guide (MRG) pp. 316-317 Retirement Funds**
3. **Excerpt from MRG p. 391 Medicaid Buy-in Program for Working People with Disabilities**
4. **GIS 98 MA-024-Retirement Funds owned by Medicaid Applicants/Recipients**
5. **Excerpt from POMS: SI 01120.210 Retirement Funds**
6. **Matter of Arnold S., FH # 3701203H**
7. **N.Y. State Letter to Monroe County DSS re decision in Arnold S.**
8. **Matter of Kern, FH #3873663J**
9. **Matter of Elizabeth, FH # 4008047R**
10. **18 NYCRR §360-4.10(a)(9)**
11. **GIS 06 MA/004 Treatment of Community Spouse's Retirement Funds**
12. **NYS Register/January 19, 2005**
13. **Excerpt IRS Publication 590 regarding calculation of required minimum distributions**
14. **IRS Uniform Lifetime Table for calculation of RMD**
15. **GIS 12 MA/025 and most recent Social Services life expectancy table**
16. **Memo from Oneida Co. Department of Social Services dated 4/17/2012**
17. **Excerpt from Medicaid Reference Guide (MRG) pp. 452-454; Transfer of Assets-Annuities.**
18. **Matter of the Appeal of _____, FH # 5337190Z**
19. **Entz v. Reed, Index No. 2009-10454 (Sup. Ct. Monroe Co. March 9, 2009)**