

The ElderLaw Report

Volume III, Number 1

HARRY S. MARGOLIS, ESQ., EDITOR

July/August 1991

Advanced Medicaid Planning: Spousal Impoverishment

By Ron M. Landsman

Because of the nooks and crannies in the "spousal impoverishment" provisions added by Congress in 1988, Medicaid eligibility law as it now stands presents advocates with many opportunities to preserve and protect the income and resources of the community spouse. (These changes are codified at 42 U.S.C.A. §§1396p(c) and 1396r-5 (1990 Supp.)) Much of the freedom for advocacy lies in the discrepancies between the federal law and state implementation, or in the generalities of the federal law that have not yet been defined or limited by regulation.

This two-part article reviews the planning opportunities presented by these discrepancies, including some of the comments and observations of experts from around the country. This first part discusses income and resource maximization for the community spouse; the second part, to be published in a subsequent issue, will cover resource transfers, trusts, and post-eligibility issues.

The Nursing Home Spouse's Income

Subject to limited deductions, the nursing home spouse's income defines the maximum that he or she is required to contribute toward the cost of the nursing home care. In general, a couple is almost always better off if income is shifted from the nursing home spouse to someone else — to either the community spouse or adult children. This is usually not possible with respect to retirement benefits from the government or qualified plans by voluntary action of the beneficiary. Other than the simple transfer of ownership of underlying income-yielding assets, the one vehicle through which planning and action are possible is either a testamentary or inter vivos trust.

The trust income provisions (42 U.S.C.A. §1396r-5(b)(2)(B)(i)) override the Medicaid Qualifying Trust provision (§1396a(k)) to the extent that they are inconsistent. The latter makes income available if a trustee has any discretion to

make payment; the former appears to do just the opposite. If the trust document is silent, income is considered available to the nursing home spouse only if "payment of income is made solely to [that] spouse." Half of the income is considered available to each "if payment of income is made to both...."

This language seems to encourage the use of trusts with open-ended income provisions when at the time the trust was created it was not known which spouse would require nursing home placement. The best solution is to permit payment of income to either spouse, within the discretion of the trustee. Under the statutory trust income provisions, if the trustee made payment only to the community spouse, that income would be considered available only to that spouse.

A Sketch of the Community Spouse Income Determination

Under 42 U.S.C.A. §1395r-5(d)(1)(B), determination of the community spouse income allowance has six elements:

1. Basic spousal income allowance (42 U.S.C.A. §§1396r-5(d)(2)(A) and (d)(3)(A)(i)): 133 percent of the official income poverty line for a family of two, as determined by the OMB; as of July 1, 1991, \$984 per month;

PLUS

2. Shelter costs included in the shelter allowance (42 U.S.C.A. §1396r-5(d)(4)): items such as mortgage principal and interest or rent, taxes and insurance, condominium fees, plus a standard utility allowance in excess of 30 percent of the basic spousal income allowance; as of July 1, 1991, \$295 per month;

SUBJECT TO

3. A cap on the allowance, adjusted annually for inflation; in calendar year 1991, \$1,661 per month;

LESS

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4. Monthly income otherwise available to the community spouse (42 U.S.C.A. §1396r-5(d)(2)(B));
OR
5. Court-ordered support (42 U.S.C.A. §1396r-5(d)(5));
OR
6. At a fair hearing, on a showing of "exceptional circumstances resulting in significant financial duress," revision of the minimum monthly needs allowance (42 U.S.C.A. §1396r-5(e)(2)(B)).

There is little the individual applicant's advocate can do with respect to the determination of the basic spousal allowance, the shelter allowance floor (which is derived from the basic allowance), or the cap, all of which are calculated from other sources determined independently of the Medicaid program. Those bearing review for each client are (a) includible shelter costs, and (b) what constitutes the community spouse's "monthly income."

"Monthly Income Otherwise Available"

The community spouse's own "monthly income otherwise available" is deducted from the minimum monthly maintenance needs allowance. The latter is the basic allowance plus the shelter allowance. The question is, what is "monthly income"? (Maryland, for example, has ruled informally that capital gains when realized, interest on zero coupon bonds, and IRA disbursements — all otherwise viewed as income for tax or accounting purposes — need not be reported for counting as a spouse's monthly income.)

As an example of what "otherwise available" means, some investments generate income based on the passage of time but do not pay it out except at certain times. Another example is the payment of income to a trust, such as the one in *Miller v. Ibarra*, 746 F. Supp. 19 (D. Colo. 1991).

Maximizing the Shelter Deduction

In states not using the federal cap on the monthly income allowance as the income floor, community spouses may benefit from having mortgage payments structured so that the monthly payment equals the maximum amount deductible under the income formula. Changing the schedule of payments on the mortgage does not increase the community spouse's effective net income because every additional dollar of income must go toward a mortgage payment, but the additional income goes toward paying the principal on the loan as well. This reduces the principal of the loan that will be outstanding at the time of the nursing home spouse's death. Depending on the ages of the spouses and other considerations, the savings may be significant.

Resource Determination Considerations

The community spouse resource allowance (CSRA) can be determined under 42 U.S.C.A. §§1395r-5(c)(2)(B) and (f)(2)(A) using one of three alternative approaches: each presents distinct elements that bear attention by advocates.

In addition, there are three other elements to take into account in determining resources. The three different approaches to getting Medicaid eligibility for a spouse are as follows:

1. *The "lesser of" rule.* The community spouse is permitted to retain assets equal to the lesser of the annually adjusted maximum allowance (\$66,480 in calendar year 1991) and half of the couple's combined assets as of the date of institutionalization (assessment amount). There is also a floor of \$13,296 in calendar year 1991. Each state has the option of raising that floor to anywhere from \$13,296 to the maximum of \$66,480. The interesting issue here is whether to increase the assessment amount by deferring payments on debts or by borrowing prior to admission. (See "Practice Tips: Increase Assets Prior to Snapshot," *The ElderLaw Report*, June 1991, Vol. II, No. 11.)

2. *Adequacy of income.* If the community spouse's monthly income is less than the income allowance to which he or she is entitled, the community spouse is permitted to retain assets (in excess of the CSRA determined under the previous paragraph) adequate to generate sufficient income to raise the spouse's income to the level of that allowance. This presents many issues around the question of how much income the assets generate: Is the historical rate of return of this applicant's assets the appropriate one to be used? If not, what is the appropriate rate? To what assets is this rate of return to be applied?

3. *Spousal support or refusal.* If the State has the right to bring a support action against the community spouse, either by reason of an assignment by the nursing home spouse or by law without such an assignment, the community spouse is permitted to retain any amount of resources.

Medicare Trust Fund Running Short

In its annual report, the Social Security Board of Trustees predicted that the Medicare Hospital Insurance Trust Fund will run out of funds in 2005, based on the most likely economic and demographic assumptions. Using more optimistic assumptions, the trust fund will be exhausted in 2018; with more pessimistic assumptions, exhaustion will occur as soon as 2001.

The trustees explain that while currently more than four covered workers support each Medicare beneficiary, by the middle of the next century there will be only two workers supporting each enrollee. The trust fund is predicted to run dry even before these demographic changes occur.

The non-hospital trust fund, Part B, is on better actuarial footing, according to the trustees. It is three-quarters supported by the general revenues of the federal government and one quarter by premiums paid by the beneficiaries themselves. However, over the past five years the outlays have nearly doubled, growing 37 percent faster than the economy as a whole.

Determining the "Lesser of"

The primary strategy available is to secure the maximum assessment amount while also providing the mechanism for an aggressive post-admission spend-down. The key to this strategy is recognizing that Medicaid is not a net-worth system; it looks only at assets, not at liabilities. A higher level of assets, even with higher liabilities, at the time of institutionalization is to the community spouse's advantage. This works up to twice the maximum CSRA, or \$132,960 (\$66,480 x 2) in 1991. This can be accomplished by:

1. *Postponing payment of debts.* Postponing credit card, mortgage, and even tax payments until shortly after nursing home admission allows the community spouse to show a higher level of assets in determining the assessment amount.

2. *Incurring new debt.* Nothing in the statute or regulations distinguishes new debt or assets from old; borrowed resources, so long as they are not subject to a lien, should be considered available and thus contribute to the community spouse's resources at assessment.

Adequacy of Income

1. *Invested amounts.* Should investments with highly uncertain return, such as real estate limited partnerships, have imputed a rate of return of any kind, or should they be deemed to have no return until some activity results in a more definite value? Given the high cost of liquidating limited partnership investments because of the weak secondary market (wholly aside from Medicaid consequences), there is a fair argument that a spouse should be permitted to retain a zero return limited partnership as the most prudent course.

2. *Appropriate rate of return.* Should the rate of return be determined by what the client has earned in the past, based on some reasonable theoretical rate, such as published rates on money market funds invested in U.S. Treasury obligations? (The latter was argued for and used in a case reported here earlier this year. See Wilcox, "MCCA Allows Expanded CSRA to Generate Necessary Income," *The Elderlaw Report*, January 1991, Vol II, No. 6.)

Maine has taken the lead and has decided to impute the basic passbook savings interest rate for all adequacy-of-income cases. That state has also introduced an interesting procedural question: while the federal statute is less than clear, there is certainly an argument that Congress intended that the rate of return be determined in each case at a fair hearing. Maine has cut through that implicit requirement and has issued a regulation providing for use of the same rate in all cases, permitting the resource allowance rate to be determined by individual caseworkers and thus avoiding the need for hearings.

The Policy of Refusal of Spousal Support

In Maryland, it is called "spousal support"; in New York, it is "spousal refusal" or "just say no." In either case, as a policy, the community spouse is entitled to retain unlimited resources if the state has the power to recoup the cost of the nursing home spouse's care from the community spouse. The congressional intent behind the policy of providing this

particular benefit is ambiguous.

In most states, the Medicaid pay rates for nursing home care are substantially less than private pay rates. Spousal support eligibility permits families to take advantage of the lower Medicaid pay rates, and they can do so at no cost to the state. As far as the specific states go, this is a wash: the states can collect back from the spouse what is being paid for the nursing home spouse's care, while the couple obtains the benefit of the Medicaid-level pay rates. To be sure, nursing home owners may not be happy with this arrangement, but they have the choice of not participating in Medicaid.

The federal statute does not require a formal refusal by the community spouse to provide support of the nursing home spouse. However, at least some states do not require the filing of a written refusal, and many clients would probably find it objectionable if it were required.

The presence of a state law authorizing support actions appears to be crucial when the nursing home spouse is incompetent, absent appointment of a guardian authorized to assign his or her support right to the state. For example, in New York the Department of Social Services is authorized by statute to bring suit to "compel any person liable by law for support to contribute to the support of any person cared for at public expense..." (N.Y.S.S.L. §102.) Notwithstanding the statute, support actions are not pursued in New York City, while elsewhere in the state, no support action is taken if the community spouse agrees to contribute 25 percent of the excess of her income over \$1,662 (the cap on the community spouse income allowance, which New York has set as the minimum as well).

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ElderLaw Facts Census Reports Growth of Older Population

The Census Bureau reports in its recently released final compilation of the 1990 census that 13 percent of Americans were 65 and older last year, up from 11 percent in 1980. The fastest growing segment of the population are those 85 and older. They numbered 3,080,165 in 1990, 37.6 percent more than in 1980. Those 65 to 74 years old numbered 18,106,558, 16.2 percent more than in 1980. And there were 10,055,108 Americans between the ages of 75 and 84, up 30.1 percent from 1980. The growth in the elder population is likely to slow down over the next ten years because there was a 2.6 percent drop in the number of Americans between the ages of 55 and 64 between 1980 and 1990. But after the year 2000 the numbers of elderly should begin climbing to new highs as the "baby boom" generation reaches this plateau.